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**The Implementation of Affirmative Action  
in Higher Education in the Context of  
American Liberal Tradition and Equal Individual Rights**

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## **Abstract**

This thesis analyzes the implementation of affirmative action in higher education with African Americans as its beneficiaries. The thesis has briefly presented the arguments both pro and counter affirmative action and the lawsuits that arose during the implementation of the policy. The study incorporates several theories, in the light of which it examines the policy from the perspective of morality and feasibility. The thesis relies heavily on literature. It belongs to the category of qualitative research, which intends to interpret the policy as a meaningful social phenomenon.

Affirmative action, as an outcome of the civil rights movement, was originally intended to counteract racial discrimination prevalent at the time. Preferential treatment was given to those African Americans who had potential and motivation but were excluded from social mobility because of racial discrimination. Through the analysis in light of the theories, this study finds that affirmative action agrees with the principles of social justice and equality and with the American creed of liberty and individualism. To the race of African Americans, it helps defeat nihilism, making up part of a bigger project to eradicate the core of racial discrimination.

But the realization of a noble ideal depends on a feasible policy. After the policy rationale had shifted from correcting past wrongs to achieving diversity, especially with the changes in American demography, affirmative action has been exposed to more criticism. While this thesis is supportive of affirmative action, it also takes seriously the arguments of those who are against affirmative action, trying to track down the reasons that they have mustered with great constituency.

Through analysis and comparison, the thesis eventually arrives at the conclusion as such: Affirmative action is necessary for the progress of American society, and in the long run, it will benefit all social members, especially the disadvantaged ones. The defects emerged in the process of its implementation are evidence that it needs alteration and adjustment in accordance with the changes in policy context, which is an inherent part of policy process. The thesis therefore advocates mending, rather than ending the policy.



## Table of Contents

<b>Abstract</b>	i
<b>Table of Contents</b>	iii
<b>Acknowledgements</b>	vi
<b>CHAPTER ONE: INTRODUCTION</b>	1
1.1. Research Background and Rationale	3
1.2. Research Aim, Problem and Questions	6
1.3. Methodology	7
1.3.1 Choice of Paradigm	7
1.3.2. Information Source	8
1.4. Limitation	8
1.5. Structure of the Thesis	9
<b>CHAPTER TWO: THEORETICAL FRAMEWORK</b>	11
2.1. A Theory of Justice by John Rawls	11
2.2. A Theory of Equality by Douglass Rae	16
2.3. Theories on Higher Education	19
2.4. A Theory on Policy Analysis by Ase Gornizka	23
2.5. Chapter Summery	25
<b>CHAPTER THREE: DIALOGUE ON AFFIRMATIVE ACTION</b>	26
3.1. Affirmative Action in the Supreme Court	26
3.1.1. <i>Brown v. Board of Education</i> (1954)	26
3.1.2. <i>University of California Regents v. Bakke</i> (1978)	27
3.1.3. <i>Hopwood v. State of Texas</i> (1996)	29
3.1.4. <i>Grutter v. Bollinger</i> and <i>Gratz v. Bollinger</i> (2003)	29
3.1.5. Section Summer	30

3.2. Academic Debate	30
3.2.1. On Equal Individual Rights	31
3.2.2. On Diversity	36
3.2.3. On Race-based vs. Class-based Programs	39
3.2.4. On Meritocracy vs. Mediocrity	43
3.2.5. On Stigma vs. Respect	46
3.3. Chapter Summery	50
 <b>CHAPTER FOUR: IDEAL VS. REALITY</b>	 51
4.1. American Liberalism	51
4.1.1. The Concept of Liberalism and Its Evolution	51
4.1.2. American Liberal Politics	53
4.2. The Status of African Americans	54
4.2.1. The Plight of African Americans	54
4.2.2. The Cause of the Plight	57
4.3. Chapter Summery	58
 <b>CHAPTER FIVE: POLICY ANALYSIS</b>	 60
5.1. Evaluation in Light of Rawls' Theory of Justice	60
5.1.1. Affirmative Action as Guarantee of Political Rights	61
5.1.2. Affirmative Action as an Approach to Equality of Opportunity	62
5.1.3. Affirmative Action and the Principle of Difference	64
a. Affirmative Action and the Principle of Redress	64
b. Affirmative Action and the Conception of Reciprocity	65
c. Affirmative Action and the Principle of Fraternity	66
5.1.4. Justice Ideal and Practice	66
5.2. Evaluation in Light of Gornizka's Theory of Policy Analysis	68
5.2.1. Policy Problem	68
5.2.2. Policy Objective	70

5.2.3. Policy Normative Basis	72
5.2.4. Policy Instruments	75
5.2.5. Policy Linkage	77
5.3. Evaluation in Light of the Theories of Equality and Higher Education	80
5.3.1. Higher Education as a Unique Policy Context	80
5.3.2. Equality in Higher Education	83
a. Individual Equality vs. Racial Equality	83
b. Higher Education as Resource vs. Public Demand for It	83
c. Two Alternatives to Equal Opportunity: Procedure vs. Prospect	84
d. The Extent of Equality vs. Effectiveness	86
e. Equal Consideration vs. Equal Treatment	87
5.4. Comment on Criticisms of Affirmative Action	88
 <b>CHAPTER SIX: EPILOGUE</b>	 91
 <b>Bibliography</b>	 94

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*Jingyi Dong*

*Oslo, May 2008*



# **The Implementation of Affirmative Action in Higher Education in the Context of American Liberal Tradition and Equal Individual Rights**

## **CHAPTER 1 INTRODUCTION**

In the 1960s, the U.S. Congress outlawed racial discrimination in employment, education and housing. But by the 1970s there came a long and divisive struggle over the sufficiency of these civil rights era measures and over whether “extra steps” could be taken to benefit blacks and other minorities in order to achieve greater equality. These extra steps became known as affirmative action.<sup>1</sup>

Affirmative action refers to “the set of public policies and initiatives” intended to help get rid of past and present discrimination based on race, color, religion, sex or national origin, or it means “ethnoracial preferences in the allocation of socially valuable resources”.<sup>2</sup> By Kent Grenawalt’s definition, affirmative action refers to “attempts to bring members of underrepresented groups, usually groups that have suffered discrimination, into a higher degree of participation in some beneficial program”, which may or may not include preferential treatment.<sup>3</sup> In Walter Feinberg’s view, affirmative action is “a set of laws, policies, guidelines, and administrative practices” designed to eliminate discrimination that violates the “inherent equality” of people by discriminating against individuals on the assumption that they are inferior or different.<sup>4</sup> Louis J. Pojman thinks that affirmative action is “Janus-faced or ambiguous, having both a backward-looking and a forward-looking feature”. With the

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<sup>1</sup> David G. Savage, *The Supreme Court and Individual Rights* (Washington D.C.: CQ Press, 2004), 296.

<sup>2</sup> Marquita Sykes, “The Origins of Affirmative Action”, in *Notional Organization for Women* (August, 1995), accessed in 2007, <http://www.now.org/nnt/08-95/affirmhs.html>; Peter H. Schuck, “Affirmative Action: Don’t Mend or End It--Bend It”, in William Lasser, ed., *Perspectives on American Politics*, Fourth Edition (New York, NY: Houghton Mifflin Company, 2002), 122.

<sup>3</sup> Kent Grenawalt, *Discrimination and Reverse Discrimination* (New York, NY: Alfred A. Knopf, 1983), 17, as quoted in Ole O. Moen, *Race, Color, and Partial Blindness* (Oslo: Solum Forlag, 2001), 211.

<sup>4</sup> Walter Feinberg, *On Higher Ground: Education and the Case for Affirmative Action* (New York, NY: Teachers College, Columbia University, 1998), 4, as quoted in Ole O. Moen, *Race, Color, and Partial Blindness*, 211.

backward-looking feature, it endeavors to correct and compensate for past injustice; with the forward-looking feature, it aims at the ideal of a “society free from prejudice”.<sup>5</sup> Joan Hoff thinks that affirmative action is installed as a temporary, remedial legal measure to counteract inequality because the equal-protection doctrine has been insufficient to prevent discriminatory preferences under the law that have concentrated power, wealth and privilege in the hand of white males.<sup>6</sup> In a nutshell, affirmative action, including or excluding preferential treatment, refers to resource distribution measures which target discriminations that violate inherent human equality. The discriminations may result from unjust social structure in the past and at present or from the deficiency in the very equal-protection doctrine. Affirmative action may be oriented to the past or the future.

The founding rationale of affirmative action, as is put by Barbbara R. Bergmann, was to compensate African Americans for their disadvantaged position entailed by two centuries of slavery and one century of segregation in the South and poverty and discrimination in the country as a whole.<sup>7</sup> The phrase “affirmative action” first appeared in an executive order issued by President John F. Kennedy in 1961. The concept of “affirmative action”, however, was first established by President Lyndon B. Johnson. Not long after the Civil Rights Act of 1964 was legislated, President Johnson claimed that “fairness required more than a commitment to impartial treatment”, and he declared the arrival of “the next and more profound stage of the battle for civil rights”.<sup>8</sup> Ever since, the underlying rationale of affirmative action has changed considerably. Those who dvocated the policy demanded “goals and timetables” so as to end discrimination. By the late 1980s, however, the proponents shifted the focus from compensating for past wrongs to “diversity” (Savage, 2004, 297). Until today, the “ebb and flow” of public

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<sup>5</sup> Louis P. Pojman, “The Moral Status of Affirmative Action”, in Francis J. Beckwith and Todd E. Jones, eds., *Affirmative Action: Social Justice or Reverse Discrimination?* (Amherst, N.Y.: Prometheus Books, 1997), 177, quoted in Ole O. Moen, *Race, Color, and Partial Blindness*, 211.

<sup>6</sup> Joan Hoff, *Law, Gender, and Injustice* (New York, NY: New York University Press, 1991), 27, as quoted in Ole O. Moen, *Race, Color, and Partial Blindness*, 211.

<sup>7</sup> Barbara R. Bergmann, *In Defense of Affirmative Action* (New York, NY: Basic Books, a division of Harper Collins Publishers, 1996), 125.

<sup>8</sup> Savage (2004), 296, 297; Stephen Cahn, “On the history of Affirmative Action”, *The Affirmative Action and Diversity Project: A Web Page for Research (AAD Project)*, (1995), accessed in 2007, <http://aad.english.ucsb.edu/docs/Cahn.html>.

disputes over affirmative action is still going on.<sup>9</sup>

### **1.1. Research Background and Rationale**

At the time the policy makers conceived affirmative action, blacks as a group were severely handicapped in American life, particularly in education. During slavery in some states, efforts to educate blacks would bring about a penalty. Under segregation, schools for blacks were inferior. After the *Brown* decision in 1954, which outlawed racial segregation, resistance to racial integration was massive.<sup>10</sup> It was only after WWII that the federal government began to give more attention to the condition of African Americans. One reason was international: When the new African countries got rid of the old colonial reign, both western countries and the opposite camp headed by the Soviet Union started a competition for influence in these new states. Discrimination against blacks at home put Americans in a dilemma. There was also another reason that was domestic: The voting power of African Americans in national elections was increasing.<sup>11</sup>

In March 1961, President John F. Kennedy issued Executive Order 10925, calling for affirmative action to uproot the then widespread practices of discrimination.<sup>12</sup> There were several reasons for the campaign: The economy was prosperous; the police violence against southern civil rights demonstrators was broadcast to the public through television; President Kennedy died in 1963 as a martyr; President Johnson demonstrated determination; and Republicans were willing to cooperate and compromise. All these forces combined together to make up a “reform drive” in Congress, which was overwhelming enough to override a southern filibuster and push through the Civil Rights Act in 1964.<sup>13</sup>

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<sup>9</sup> Robert Fullinwider, “Affirmative Action” in *Stanford Encyclopedia of Philosophy* (2005), accessed in 2007, <http://plato.stanford.edu/entries/affirmative-action/>.

<sup>10</sup> Terry Eastland, *Ending Affirmative Action: the Case for Colorblind Justice* (New York, NY: Basic Books a division of HarperCollins Publishers, 1996), 73.

<sup>11</sup> William Julius Wilson, “Race-neutral Programs and the Democratic Coalition”, in Francis J. Beckwith and Todd E. Jones, 155; originally from *The American Prospect* 1 (Cambridge, Mass.: The American Prospect, Spring 1990).

<sup>12</sup> Steven M. Cahn, “Introduction”, in Steven M. Cahn ed., *The Affirmative Action Debate* (New York, NY: Routledge, 1995), xi.

<sup>13</sup> Hugh Davis Graham, *Collision Course: The Strange Convergence of Affirmative Action and Immigration Policy in America* (Oxford, New York: Oxford University Press, 2002), 22.

Originally, the goal of affirmative action was “equal opportunity in employment” (Cahn, 1995, xi). But a more radical thought of affirmative action was justified by President Lyndon Johnson’s illustration: “You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of race, saying, ‘You are free to compete with all the others’, and still justly believe you have been completely fair”. The President thus called for “not just freedom but opportunity, not just equality as a right and a theory, but equality as a fact and as a result”. This was taken as a call for equality as a result (Savage, 296-297). Some black leaders also found that it was not enough only to eliminate active discrimination. The past racial oppression left over effects, and consequently it was necessary for the government to mandate affirmative action programs to overcome minority underrepresentation in employment, education and public programs (Wilson, 1990, 157). In the meantime, urban minorities found that they were little benefited by the civil rights legislation of 1964-1965, which incurred inner-city race riots. Federal officials were thus urged to put “aggressive efforts” on behalf of blacks in order to cool down the violence (Graham, 2002, 31). Hence were the extra steps which went beyond the limit of equal treatment.

While the Johnson Era initiated the first steps in affirmative action, it was really the Nixon Era that witnessed the big advances. Federal civil rights policy shifted from an “equal treatment basis” in the 1960s to an “equal result basis” in the 1970s (Ibid., 93). Over time, affirmative action has come to benefit some other minority groups and women. And the founding rationale, which targeted past discrimination, was redefined and rejustified accordingly in terms of overcoming “underrepresentation” and achieving “diversity” (Eastland, 1996, 199). As a result, critics described affirmative action as “reverse discrimination” or as “racial preferences”. Ever since, there have been efforts to overthrow this civil rights policy. Especially since the 1970s, there has been “a long and divisive struggle” over whether extra steps should benefit blacks and other minorities, and there was the need for these civil rights era measures to be unambiguously delimited (Savage, 296). In the 1980s, President Reagan opposed to the numerical devices associated with affirmative action. This, however, did not have enough power to end the policy. In 1994, a Republican Congress was elected, which

added fuel to the controversy (Eastland, 63).

In recent years, affirmative action remains one major area of controversy and divisiveness in the civil rights area.<sup>14</sup> Old and new problems combine to complicate the issue further. In education, racial discrimination, admittedly receding, is still existent in the United States (Eastland, 73). In workplaces, minority people and women continue to be excluded from many kinds of jobs. Whites still monopoly most of the high positions and many of the not-so-high places. This pattern of opportunity distribution has little been touched in American society (Bergmann, 1996, 13). Moreover, the “unintended consequences” of two reforms of the 1960s, the immigration reform and the civil rights reform, began to conflict with each other in the 1970s. African Americans are not the only beneficiaries of affirmative action, so that by the end of the 1990s mass immigration from Latin America and Asia undermined the preferential policy’s original, black-centered rationale (Graham, 197, 12). As such, disputes over affirmative action are still going on and the dust is not likely to settle quickly.

This study inherently has a deficiency in the fact that the author has no life experience in the United States. But in one sense, this disadvantage may put the author behind a “veil of ignorance”, as John Rawls puts it, and hence in a situation to provide a new perspective to the discussion.<sup>15</sup> What is more, the study of affirmative action is taking on significance that goes beyond the boundary of the United States. Increasing participation in higher education has become a global orthodoxy, and new patterns of discrimination based on academic qualifications will become more influential.<sup>16</sup> Thus affirmative action’s involvement in the field of higher education has attracted attention from societies other than the United States. Take as an example the case of China, the author’s home country, where the government officially pronounced its transition from

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<sup>14</sup> Williom Lasser, *Perspectives on American Politics*, Williom Lasser ed. (Boston, New York: Houghton Mifflin Company, 2004), 111.

<sup>15</sup> John Rawls, *A Theory of Justice, Revised Edition* (Cambridge, Mass.: Harvard University Press, 1999), 118.

<sup>16</sup> P. Maassen & N. Cloete, “Global Reform Trends in Higher Education”, in Cloete, N. et al. eds., *Transformation in Higher Education. Global Pressures and Local Realities in South Africa* (Wynberg, South Africa: Juta and Company, 2002), 24; Peter Scott, “Massification, Internationalization and Globalization”, in *The Globalization of Higher Education* (Buckingham, UK: Open University Press, 1998), 111.

elite to mass higher education at the end of the twentieth century. Typically, during the early stages of the expansion, increased differences in access to higher education have become a serious political issue in the context of democratic and egalitarian values.<sup>17</sup> When this has happened in China, academia turns to American affirmative action as a case of reference. Hence this study, which reflects on the positive and negative sides of affirmative action in the American higher education system as the cradle of mass higher education, will hopefully obtain references and insights which may contribute to the cause of equality in other higher education systems, like that of China.

## **1.2. Research Aim, Problem and Questions**

It seems to be an irony that the arguments for and against affirmative action are in fact based on the same belief: protection of individual rights, a promise that the Constitution makes twice--in Fifth and the Fourteenth Amendment. Of course, the two amendments emerged from different backgrounds with an interval of nearly 77 years between their ratification. In the first case, the Fifth Amendment intended to prevent the overreach of the federal government. This is because persons first involved in the formulation of the Bill of Rights, including the Fifth Amendment, had lived through bitter years when governments trampled on the human rights that they and their ancestors in the colonies and in England had fought so hard to secure. In the second case, affirmative action was born of the modern civil rights revolution, which traced its original foundation in the Fourteenth Amendment. This amendment, which was issued after the Civil War as guarantee of equal rights for the freed slaves and other blacks, was intended to prevent the overreach of the states. In spite of the difference in targets, both amendments emphasize that no person shall be deprived of life, liberty or property without due process of law. In other words, the authors of both amendments found that the best route to social justice was through the protection of individual rights.

Since both proponents and opponents of affirmative action share the same point of departure, it is possible for them to have a mutually accepted criterion by which to

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<sup>17</sup> Martin Trow, *Problems in the Transition from Elite to Mass Higher Education* (Berkeley, California: Carnegie Commission on Higher Education, 1973), 4.

evaluate their arguments. The aim of this study, therefore, is to analyze the rationale and social significance of implementing affirmative action in higher education from a mutually accepted perspective: social justice and equality. With this aim, the central research problem is thus formulated: “What is the rationale and social consequence of implementing affirmative action in higher education in the American liberal tradition of equal individual rights?”

The central research problem is further elaborated upon in the process of searching for answers to the following questions:

- How was affirmative action initiated and how has its paradigm shifted?
- What is the balance between the two competing factors, equal individual rights and compensation for disadvantaged groups, according to theories of justice and equality?

### **1.3. Methodology**

#### **1.3.1. Choice of Paradigm**

The paradigm is decided by the three features of the study:

- a. This thesis studies affirmative action as a “meaningful” social action, not just as the external or observable behavior of people. The study will take into account the social actor’s reasons and the social context of action.<sup>18</sup> In other words, the intent of the study is to understand affirmative action in a way one understands “a particular social situation, event, role, group or interaction”.<sup>19</sup>
- b. The study will involve detailed reading and examination of texts, because the discussion of affirmative action traces its origin back to the past and has produced a rich literature.
- c. The study does not deny its “value-laden nature” (Ibid., 6-7).

This study therefore relies on a qualitative method, which belongs to the interpretive repertoire, in order to interpret affirmative action as a set of “culturally or historically significant phenomena”. The research method is so chosen because

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<sup>18</sup> Laurence W. Neumann, *Social Research Methods* (Boston, NY: Allyn & Bacon, 2000), 71.

<sup>19</sup> J. W. Creswell, *Qualitative Inquiry and Research Design: Choosing among Five Traditions* (Thousand Oaks, Calif.: Sage, 1998), 161.

qualitative research is one of the “strategies” primarily for the purpose of interpretation.<sup>20</sup> It is also because interpretive approach requires that social research techniques should be sensitive to “context”, gain insight into others’ worldviews and understand feelings rather than only focus on “testing laws” of human behavior (Neumann, 2000, 75).

### **1.3.2. Information Source**

The study is literature-based, obtaining information mainly from secondary sources such as monographs, anthologies and articles already published. The literature needed for the study will be obtained from private sources, libraries and the Internet.

### **1.4. Limitation**

Higher education entrance for African Americans is chosen as the focus of this study. Affirmative action deals with the problem of equal opportunity in several areas such as higher education, employment, promotion and layoffs. The policy targets several disadvantaged groups such as African Americans, Native Americans, women, etc. As a result, the issue is complicating and confusing. Given that the author’s personal interest is mainly in higher education and that the thesis has a limited length, the discussion focuses on higher education admission policy. And of all the targeted groups of the policy, only African Americans, the originally beneficiaries, will be concerned. Other issues such as employment and promotion opportunity for other disadvantaged groups will be touched upon, but there will be no elaboration of those aspects. Issues other than affirmative action such as discriminatory history and the socio-economic status of blacks will also be related only to provide the background information for the central discussion.

The main goal of the study is to not to put forward suggestion for the future implementation of affirmative action, but rather to analyze it as a disputed social phenomenon and evaluate it by several theories. The study will present the policy’s

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<sup>20</sup> C. R. Ragin, *Constructing Social Research* (Thousand Oaks, Calif.: Pine Forge Press, 1994), 31-53, 39.



significance in developing a more ideal society and will point out dilemmas that policy makers confront. There will be no intension to extend the study beyond a public policy analysis.

The literature upon which the thesis is based may not be fully up-dated. The issue of affirmative action embraces a very broad spectrum and has undergone a long process of evolution, so that the study cannot be isolated from history. While new material on affirmative action is coming all the time, this study uses literature that the author considers to be fairly representative of different perspectives and times.

### **1.5. The Structure of the Thesis**

Chapter Two is devoted to literature review, mainly including: 1) the theory of justice by John Rawls; 2) the theory of equality by Douglas Rae; 3) some theories on higher education; 4) the policy analysis theory by Ase Gornitzka. The literature review outlines the theoretical basis for the analysis of the arguments both pro and counter affirmative action, which will 1) provide moral justifications of the arguments, 2) present higher education institutions as a unique policy context, and 3) define the characteristics of public policy. The theories combine together to prelimit the policy analysis in Chapter Five.

Chapter Three presents the arguments in the Supreme Court and in the academia concerning current multi-faceted perspectives. The present study is related to the larger, ongoing dialogue about affirmative action and draws on the results of other studies. A review of arguments, both for and against affirmative action, furnishes a stage on which to locate this study and provides benchmarks for comparing the results of the study with other findings.

Chapter Four intends to contextualize the arguments about affirmative action. It will narrate the liberal tradition and racial discrimination in the United States. The purpose is to depict the background reality in which affirmative action has been implemented.

Having decided the point of departure of the study, presented the arguments of both pro and counter affirmative action, and fitted the arguments in the social context, the

stage has been reached in Chapter Five to analyze affirmative action from the perspective of justice and equality.

Chapter Six summarizes the research results of the foregoing chapters and will arrive at a conclusion as to whether affirmative action conflicts with or is in agreement with the Constitution's promise of equal individual rights. As time passes and situations vary, the question arises whether to end or to mend affirmative action.

## CHAPTER 2

### THEORETICAL FRAMEWORK

Defenders of affirmative action claim that only such preferences can compensate for past discrimination and ensure a level playing field for current and future generations, while opponents object to it because it allows or requires individuals to be judged on the basis of characteristics such as race or gender instead of on their merits as individuals. While neither side has a monopoly on the truth, the dispute has put against each other the concepts of liberty and equality, two cherished human ideals. In this case, it is worthwhile to use a commonly accepted standard to evaluate the two rival arguments. With this purpose, relevant literatures are reviewed to construct a theoretical framework. The literatures reviewed fall into four categories: 1) on the concept of justice, 2) on the concept of equality, 3) on higher education, 4) on the concept of public policy. The first category is used as the basis of value judgment, while the latter three categories make the judgment relevant to specific contexts.

#### **2.1. A Theory of Justice by John Rawls**

In the 1970s, there was a “public turn” in philosophy, a representative of which was *A Theory of Justice* (1971) by John Rawls (Robert Fullinwider, 2005). John Rawls defines justice as “the first virtue of social institutions”. The primary subject of Rawls’ social justice theory is “the basic structure of society”, or the way for the major social institutions to distribute basic rights and duties and determine the division of benefits from social cooperation (Rawls, 1999, 3, 6). Rawls relates how justice should define the social system:

Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override .... [T]he rights secured by justice are not subject to political bargaining or to the calculus of social interests .... [But in practice] the institutions of society favor certain starting places over others. It is these inequalities, presumably inevitable in the basic structure of any society, to which the principles of social justice must in the first instance apply .... [L]aws and institutions no matter how efficient and

well-arranged must be reformed or abolished if they are unjust .... [A]n injustice is tolerable only when it is necessary to avoid an even greater injustice. (Ibid., 3, 4, 7)

Rawls finds that propositions for our intuitive conviction of the primacy of justice are often expressed too strongly. It is therefore necessary to work out a set of principles in the light of which contending assertions can be interpreted and assessed (Ibid., 4). Rawls narrates the process by which the principles of social justice are deduced:

Although a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as by an identity of interests .... A set of principles is required ... [to] provide a way of assigning rights and duties in the basic institutions of society and to define the appropriate distribution of the benefits and burdens of social cooperation .... They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association .... In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position ... is understood as a purely hypothetical situation ... [in which] no one knows his place in society ... nor does any one know his fortune in the distribution of natural assets and abilities .... (4, 10, 11)

Once in this original position, or behind this “veil of ignorance”, as Rawls puts it, one takes on the characteristic of a jury member, detached from interest and free from presumption. With potential sources of bias removed from the bargaining, one would choose two principles:

1) equality in the assignment of basic rights and duties ... [known as the] principle of equal liberty, and 2) [s]ocial and economic inequalities are to be arranged so that they are both (a) to the greatest expected benefit of the least advantaged ... [known as] the difference principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity ... [known as] the principle of fair equality of opportunity .... These principles are to be arranged in a serial order with the first principle prior to the second ... [which] means that infringements of the basic equal liberties protected by the first principle cannot be justified, or compensated for, by greater social and economic advantages. These liberties have a central range of application within which they can be limited and compromised only when

they conflict with other basic liberties. (Ibid., 13, 26, 53, 54, 63, 72)

As is interpreted by Douglas Rae, Rawls conceives a just society with the overall structure which “maximizes the prospects of those least favored in the natural distribution of talent and in initial social position”.<sup>1</sup>

Justification arguments of affirmative action in higher education are mainly based on the difference principle, and this review of Rawls’ literature therefore mainly revolves around the difference principle. As a contrast to the difference principle, Rawls makes a brief digression to refer to the principle of efficiency. This principle holds that “a configuration is efficient whenever it is impossible to change it so as to make some persons better off without at the same time making other persons worse off”. But the principle of efficiency does not identify one mode of distribution as the efficient one. In other words, the principle applies to a considerable wide scope, so that it carries a character of “indeterminateness”. When selecting among the many distribution patterns that can be defined as efficient, some other principles, such as a principle of justice, should be combined (Rawls, 58, 59). Otherwise, there will be little guarantee for fairness in benefit distribution.

Rawls refers to three notions of distributive principle: 1) the system of natural liberty, 2) the liberal interpretation, and 3) the democratic interpretation (Ibid., 63, 64, 65). The system of natural liberty has obvious defect: It allows distributive shares to be unduly influenced by such factors as “social contingencies and natural fortune”. The liberal interpretation intends to lessen such negative influence by adding the principle of fair equality of opportunity. For example, in the school system, effort should be made to even out class barriers (63). But the liberal concept still cannot redress the bias resulting from the natural distribution of abilities and talents. Nor can it guarantee that the principle of fair opportunity can be carried out perfectly (64). The democratic interpretation suggests that the difference principle be combined with the principle of fair equality of opportunity to remove the “indeterminateness” of the principle of efficiency. This is achieved by taking the position that the greater gains of those better

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<sup>1</sup> Douglas Rae, *Equalities* (Cambridge, Mass.: Harvard University Press, 1981), 72.

situated are just if and only if their effort is part of a scheme which increases the gains of the least advantaged members of society (65).

One factor that makes the difference principle more preferable than the principle of efficiency is its agreement to the “principle of redress”, the “conception of reciprocity” and the “principle of fraternity” (Ibid, 86, 88, 90). The difference principle achieves some of the intent of the redress principle (87). These two principles overlap with each other because they both assume that undeserved inequalities call for redress. But the two principles have a difference. The principle of redress holds that more resources should be allocated to those with fewer native assets as well as those born into the disadvantaged social positions. In contrast, the difference principle does not attempt to even out handicaps as if all were expected to have the same starting place in a race. It allocates education resources in ways that whoever gains or loses from his “arbitrary place in the distribution of natural assets or his initial position in society” should give or receive compensation in return. This scheme of allocation will improve the long-term expectation of the most disadvantaged. When, and only when this is the ultimate goal, is it justified to allocate more resources to the better endowed (86). This is where affirmative action agrees with the difference principle: Its approach of allocating education resources does not arbitrarily impose uniformity on everyone. Different from the principle of redress, it allows multiple patterns of resource distribution in which the most disadvantaged benefit the most in the long run.

With a conception of reciprocity in mind, the more advantaged admit that “a scheme of social cooperation” is needed to guarantee the well being of social members. Only when the terms of the scheme are reasonable can they expect the willing cooperation of all. Embracing the conception of reciprocity, Rawls’ justice principles require that everyone benefit from economic and social inequalities (Ibid., 88, 89). Thus it can be seen that Rawls does not intend to substitute egalitarian treatment for unequal treatment. What he insists is that any inequality should be arranged in ways that contribute to the mutual benefits of all.

The natural meaning of fraternity cannot be identified with the democratic rights, but without it, the values expressed by these rights can hardly be appreciated. What the

difference principle and fraternity have in common lies in the idea of “not wanting to have greater advantages unless this is to the benefit of others who are less well-off”. The difference principle changes the aims of the society in important aspects, especially when such aspects as self-respect or worth for the least favored are taken into consideration. This can restrict the forms of hierarchy and the degrees of inequality that justice permits. Thus, in such aspect as education resource distribution, the more a society progresses, the more consideration will be given to how much the distribution pattern can enhance the personal and social life of citizens, including the less favored, rather than to how much it can return profits in terms of economic efficiency (Ibid, 86-87, 90-92).

Douglas Rae has identified “a Rawlsian Compromise” in which Rawls comprises the principle of fair equality of opportunity in the difference principle. Rawls rejects the creed of “careers open to talent”, which means positions are only open in a formal sense. Rather, he proposes that all should have a fair chance to attain them, which means that all talents have equal prospects regardless of their starting place in society. However, he does not stop at this stage, but goes further to includes this notion within his larger conception of “maximin” justice, requiring that society be structured in a way that “maximizes the prospects of those least favored in the natural distribution of talent and in initial social position” (Rae, 1981, 72). To this extent, once affirmative action is found within the larger framework of the difference principle and “maximin” concept, it follows that the policy also conforms to the principle of fair equality of opportunity.

Like his predecessors, such as John Locke and Immanuel Kant, Rawls belongs to the social contract tradition (Rawls, 11). An analogy can be found between Rawls and the previous thinker. Rawls concludes that with a departure from the “original position”, one would accept a scheme of social cooperation that enhances the well-being of social members, especially those least advantaged. John Locke concludes that pre-social man quit the “state of nature” and willingly contract into “civil society” in which he may advance his safety and security.<sup>2</sup> Also, Rawls defines the theory of justice as “a theory

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<sup>2</sup> John Locke (1632-1704): *Two Treatises of Government*, 142-145, accessed in January, 2008, <http://socserv.mcmaster.ca/econ/ugcm/3ll3/locke/government.pdf>.

of the moral sentiments setting out the principles governing our moral powers, or, more specifically, our sense of justice” (Rawls, 44). It thus can be seen that the difference principle is in keeping with the social contract theory. And it also emphasizes morality, which agrees with Kantians.

To sum up, in the above literature review, the major content is about the difference principle, and how it is related to the other two principles, the principle of equal liberty and the principle of fair equality of opportunity. Rawls’ theory of justice can be traced back to Locke’s liberalism, which is a source of inspiration for the American Constitution. In addition, as a modern Kantians, Rawls emphasizes morality. If it can be proved in the later analysis that the difference principle justifies affirmative action, it will follow that affirmative action is moral and constitutional.

## **2.2. A Theory of Equality by Douglas Rae**

There have been countless attempts to realize equality in our society. It is this continuous and immediate demand for equality in our lives that supports Tocqueville’s famous prophecy: “The gradual progress of equality is something fated”. However, if applied indiscriminately, equality may lead to myriads of negative results: it may dampen motivations for social mobility, uniform market economy or eliminate the individualities of people of different experiences. The reason is that equality is “the simplest and most abstract of notions”, while the world that accommodates us is “irremediably concrete and complex”. Therefore, the complexity does not arise within “the abstract idea” of equality, but comes forth when it is put in the practical world (Rae, 1, 2, 5, 18)

We attach great importance to the problems of equality. Yet seldom do we have a “conceptual understanding” about what constitutes equality or how to measure it.<sup>3</sup> The efforts of Rae provide one way of measuring equality by proposing five grammatical components of equality, which clarify the complex underlying structure and make the

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<sup>3</sup> D. R. Lewis & H. Dundar, “Equity Effects of Higher Education in Developing Countries”, in David Chapman and E. Ann Austin, eds., *Higher Education in the Developing World: Changing Contexts and Institutional Responses* (Westport, Conn.: Greenwood Press, 2002), accessed in 2004, <http://education.umn.edu/PEPSC/products/LewisDundarPAPER.pdf>.



problem more manageable: the subject of equality; the domain of equality; equalities of opportunity; the value of equality; relative equalities (Rae, 133).

*The subject of equality* is concerned with such questions as “[e]quality for whom?” (Ibid, 20). This aspect mainly includes 1) equality required for all without class distinction or individual differences;<sup>4</sup> 2) equality required for individuals of the same class, accepting class inequality;<sup>5</sup> 3) equality required between different classes, accepting inequality among individuals of the same class.<sup>6</sup> Thus structural differences lead to different equalities. Probably one form of equality would fail to advance or even “wreck” another form of equality (Ibid., 37). For example, affirmative action has opposed 3) to 1), for it does not accept the differences between the white bloc and the black bloc, while it tolerates the disparities between the poor individuals and the rich individuals.

*The domain of equality* tries to answer such question as “[e]quality to what?” (Ibid, 45) It concerns the resource to be allocated and the demand for the resource.<sup>7</sup> Without resource in the first place, claim to equality cannot be meaningful (48). Vice versa, without demand, there will be no claim for equality. For example, higher education service as the resource is in the first domain, while the demand for higher education belongs to the second domain. In reality, the supply of higher education often fails to satisfy the demand from those who seek higher education opportunity, or the resource often fails to cover the demand sufficiently.

*Equality of opportunity* regards prospects and procedures. In the first regard, we do not attach importance to “the facts that determine future events”. In the second regard, equal procedures apply to each contestant in order to result in “unequal prospects of

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<sup>4</sup> *Simple individual-regarding equality* refers to a “claim of equality for one class of equals, each to be the equal of every other.” This perspective has “[b]oth conceptual simplicity and practical application” (Rae, 43, 20-21).

<sup>5</sup> *Segmental equality* refers to a “claim of equality for two or more classes of equals, equality being required within each class and not between classes.” In this perspective, “[t]he segments of equality arise ... to systematize inequality” (Rae, 43, 30).

<sup>6</sup> *Bloc-regarding equality* refers to a “claim of equality for two or more subject classes, equality being required between these classes (blocs) and not within them”. In this perspective, “one equality would probably merely fail to promote the other” (Rae, 43, 37).

<sup>7</sup> The domain of allocation can be defined as “the class of things that a given agent presently controls for the purpose of allocation” A domain of account can be defined “as the class of things over which a given speaker seeks equality” (Rae, 45, 48-49).

success”.<sup>8</sup> Whether prospects or procedures are chosen as the focus of regard has to depend on the context. For examples, primary education focuses on equality of prospects, while sports competition focuses on equality of procedures.

*The value of equality* deals with human differences “that can make ‘equal’ treatments of persons ‘unequal’ and may make ‘unequal’ treatments of persons ‘equal’” (Ibid., 82). Rae cites Richard Henry Tawney to justify differential treatment with equality as the ultimate goal: “[E]quality of provision is to be achieved, not by treating different needs in the same way, but by devoting equal care to ensuring that they are met in the different ways most appropriate to them”.<sup>9</sup>

*Relative equality* tries to answer question such as “What is more nearly equal?” Equality can be achieved by way of increasing the extent or degree of equality. Regarding extent, the less excluded from benefit distribution, the more equal. Regarding degree, several schemes are involved, including: 1) to elevate the less advantaged, known as “the maximin criterion”; 2) to lower the position of the more advantaged, known as “the minimax criterion” (Ibid., 107, 110-112).

Both the maximin and minimax criterion are associated with the notion of egalitarianism. Both are rules for redistribution of resource, so that in fact they can be considered two sides of the same coin. Their difference lies in that the former focuses on the less advantaged, while the latter on the more advantaged. Once integrated in public policy, the maximin criterion may encounter less resistance than its counterpart, because the concept of maximin indicates “improvement” and hence tends to be consistent with general trend of social development. When it concerns improving the position of the disadvantaged, Rae recommends the maximin criteria, a choice that is consistent with Rawls’ principle of difference (Ibid., 110).

To sum up, in any real context no single notion of equality can cover the field. Because human societies are so complicated that equality also has to be complex to

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<sup>8</sup> “*Prospect-regarding equal opportunity* ... nothing about the people affects the result.” “The concept of prospects, thus of equal prospects, requires ignorance of the facts that determine future events.” “The means-regarding practices ... provide equal rules and equipment to each contestant--equal means--in order to reveal unequal talents, resulting in unequal prospects of success” (Rae, 66, 74).

<sup>9</sup> Richard Henry Tawney is cited by Douglas Rae in *Equalities*, 82.

approach practice (Ibid., 132, 133). But a summary can make brief Rae's discussion on equality, which leads to such a conclusion: equal treatment to all unless different treatment is strongly justified; equal consideration and respect, which may take the form of unequal treatment, to different groups and individuals.

### **2.3. Theories on Higher Education**

The implementation of a policy has to be relevant to the policy context. Understanding the nature of a higher education system as the policy context therefore helps the discussion of affirmative action in this area. Thus is presented here a brief review of relevant literatures on higher education studies.

Higher education has many functions, one of which is that it functions as a social institution to preserve, reproduce or adjust itself to implement "values that have been widely held and firmly structured by the society".<sup>10</sup> In other words, it is not enough for universities and colleges only to stick to "absolute autonomy".<sup>11</sup> They have the mission to enhance such values as democracy and equality, values that have long been cherished by human beings. Therefore, the definition of higher education has to be looser in order not to exclude from the system some of its most important participants and institutions.<sup>12</sup>

At the stage of mass higher education, universities undergo qualitative as well as quantitative changes (Trow, 1973, 6). First, the meaning of university entrance has changed. Entrance to higher education has become part of a "wider package of civic rights and democratic entitlements" (Peter Scott, 1998, 125). Increasingly, higher education participation has been converted from a privilege to a right, and ultimately to an obligation (Trow, 1973, 4-5). Second, the functions of higher education change (Ibid., 7). The movement to mass higher education brings formal and non-formal higher

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<sup>10</sup> Patricia J. Gumpert, "Academic Restructuring: Organizational Change and Institutional Imperatives", in *Higher Education* 39 (Norwell, Mass.: Kluwer Academic Publishers, 2000), 73.

<sup>11</sup> Philip G. Altbach, *Higher Education in Developing Countries: A Select Bibliography* (Cambridge, Mass.: Center for International Affaires, Harvard University, 1970), 4.

<sup>12</sup> Burton R. Clark, *The Higher Education System, Academic Organization in Cross-National Perspective* (Berkeley, Cal.: University of California Press, 1983), 5.

education “closer together”.<sup>13</sup> The non-elite sectors, which may lack the “traditional university’s internationalist rhetoric and commitment”, come nearer to the “center stage” once incorporated into unified national systems (Scott, 114, 125).

The steady expansion of higher education poses a serious threat to academic standards (Trow, 1973, 35). The elevation of non-elite institutions into the elite sphere would lead to “the dilution” of research resources and of university academic standards.<sup>14</sup> “Academic division of labor” is thus developed in American system as the “institutional mechanisms”, so that the popular and the autonomous functions are insulated from one another. This scheme helps defend the highly vulnerable autonomous functions of the elite sector against the direct impact of the larger society, whose demands are reflected and met in the popular sector.<sup>15</sup> That is, at the stage of mass higher education, the elite sector of the system by no means disappears or decreases in quality. Nor does it expand drastically in size, as does the popular sector. In contrast to the popular sector, the elite universities have special commitment to the society, so that they deserve special protection.

But that solution takes a toll of the system not only financially and politically, but also morally and intellectually (Trow, 1973, 39). Considering from the perspective of finance, no country, no matter how rich, can afford a mass system at the same cost levels that it formerly provided to its elite system.<sup>16</sup> To illustrate, universities taking on the task of “surplus labor absorption” may particularly appeal to “those lower-middle class sectors” who think their children are entitled to social mobility through higher

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<sup>13</sup> This is an interpretation of Martin Trow (1973) by Ruth Hayhoe in *China’s Universities, 1895-1995: Cultural Conflict* (New York : Garland Pub., 1996), 252.

<sup>14</sup> Martin Trow, “Governance in the University of California: The Transformation of Politics into Administration”, in *Higher Education Policy* v11 n2-3 (1998), pp.201-215, accessed in 2004, [http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?\\_nfpb=true&\\_ERICExtSearch\\_SearchValue\\_0=EJ570430&ERICExtSearch\\_SearchType\\_0=eric\\_accno&accno=EJ570430](http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=EJ570430&ERICExtSearch_SearchType_0=eric_accno&accno=EJ570430)

<sup>15</sup> Martin Trow, “Reflections on the Transition from Mass to Universal Higher Education”, in *Daedalus. Journal of the American Academy of Arts and Sciences* (Cambridge, MA: American Academy of Arts and Sciences 99 (1) 1970), 4.

<sup>16</sup> Martin Trow, *Problems in the Transition from Elite to Mass Higher Education* ( Berkeley, California: Carnegie Commission on Higher Education, 1973), 36; Martin Trow, “On Mass Higher Education and Institutional Diversity” (Samuel Neaman Institute for Advanced Studies in Science and Technology, Technion-Israel Institute of Technology, May, 2003), 6, accessed in 2004, <http://cshe.berkeley.edu/publications/publications.php?id=185>.

education. Manuel Castell calls this function the “warehouse function”, and claims that the more a higher education system is able to insulate this function from the rest, the more it is both successful and unjust.<sup>17</sup> This reflects the tension between two contradictory ideals that influence the future of the university: to pursue “the highest ‘quality’ of knowledge” within a narrow scope or to share and distribute knowledge “as widely as possible”.<sup>18</sup> It seems that the maximization of these ideals such as quantity, quality and equality can only be fulfilled at the same time in rhetoric.

Considering from the perspective of system structure, the only major transformation in American higher education over the twentieth century has been the initiation and then the expansion of the non-elite sector.<sup>19</sup> This structural change does extend opportunities to youngsters who would otherwise be excluded from higher education. But, as Peter Scott observes, higher education nowadays provides much less guarantee for one to be elevated to “national elite” than in the past. However, this old link between the university and prestige persists within the elite sector (Scott, 125). As such, while entrance to higher education has become a right, entrance to elite universities remains much of a privilege. And this difference will make great difference in the students’ future life.<sup>20</sup> At this point, democracy and meritocracy seem to have come into conflict.

It is true that once after graduation, all students from both the elite and the popular sectors will have to face the *reexamination* imposed by the market. And in the recruitment of staff, many employers use national standard tests such as CQE and SAT to predict the potential of the applicants, which goes beyond the border between the

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<sup>17</sup> Manuel Castells, “Universities as Dynamic Systems of Contradictory Functions”, in Muller, J., Cloete, N. & Badat, S., eds., *Challenges of Globalization. South African Debates with Manuel Castells* (Cape Town, South Africa: Maskew Miller Longman, 2001), 21.

<sup>18</sup> Craig Calhoun, “Passive in the Face of Change”, A lecture at La Trobe University, July, 2002, accessed in January, 2008, [http://www.latrobe.edu.au/bulletin/assets/downloads/2002/bulletin\\_jul02.pdf](http://www.latrobe.edu.au/bulletin/assets/downloads/2002/bulletin_jul02.pdf).

<sup>19</sup> Martin Trow, “From Mass Higher Education to Universal Access: The American Advantage”, *Center for Studies in Higher Education*, Paper CSHE1-00 (Berkeley, Cal.: March 1, 2000), accessed in 2004, <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1051&context=cshe>.

<sup>20</sup> Craig Calhoun, “The Specificity of American Higher education”, in R. Kalleberg, F. Engelstad, G. Brochmann & A. Leira, L. Mjoset, eds., *Comparative Perspectives on Universities. Comparative Social Research* (Greenwich, UK: JAI Press Ltd., 2000), 49-50.

elite and non-elite sector. But the first-rate resources of the elite sector and the second-rate quality of the non-elite sector will make themselves felt in this market competition. What is more, market cannot be immune from prejudice. The halo effect of the prestigious universities will not fade easily. Craig Calhoun confirms that higher education has the function of “institutional differentiation”, by which different sorts of degrees from different kinds of institutions would lead to future income and class position that are enormously different. And “there has been an increasing inequality in earnings of college graduates, which has increased the advantage of elite education compared to non-elite” (Calhoun, 2000, 49-50).

Scott points out the contribution of higher education to new class formation, claiming that when “hierarchies” based on class, race and gender are being dismantled, new class patterns based on academic qualifications will dominate (Scott, 111). Pierre Bourdieu and Jean-Claude Passeron are more radically critical of this function of higher education, assuming that the new class formation is inextricable from the old class pattern. They define pedagogical actions as “symbolic violence”, because these actions correspond to the “material and symbolic interests” of groups or classes which occupy different positions within the “power relations” and always tend to duplicate the distribution pattern of cultural capital among these groups or classes.<sup>21</sup> Especially since the early 1990s, as Philip Brown points out, access to culture capital increasingly depends upon market power. To this stage, the “ideology of parentocracy”, instead of the post-war ideology of meritocracy, has become dominant. As a result, the education system has become less able to enhance the prospects of disadvantaged students.<sup>22</sup>

To sum up, higher education as a policy context bears unique, sometimes even contradictory, features. It enhances social mobility, yet it creates new social hierarchies and the new class pattern greatly duplicates the old one. At the stage of mass higher education, with more concern for democracy and egalitarianism, a larger and more

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<sup>21</sup> Pierre Bourdieu & Jean-Claude Passeron, *La Reproduction* (Paris: Les editions de minuit, 1970), 11.

<sup>22</sup> Philip Brown, “Cultural Capital and Social Exclusion: Some Observations on Recent Trends in Education, Employment, and the Labor Market”, in *Work, Employment & Society*, Vol. 9, No. 1, 29-51 (Durham, UK: BSA Publications Ltd., 1995), pp. 745-746.

diverse student body is absorbed into the system. But the system at the same time is very alert that its elite sector should remain intact so as to protect academic autonomy. In other words, equality is the motto politically rather than academically. These Janus-faced features thus make higher education an especially slippery area for public policy makers.

#### **2.4. A Theory on Policy Analysis by Ase Gornitzka**

Because of the complexity of reality, affirmative action as a public policy and its implementation processes cannot possibly “fit the image of the perfect ‘parliamentary chain of command’, where an elected legislature makes a policy decision, whereupon an administrative agency executes them, and that policies travel untouched by the process of being carried out”. After policy formation, the policy implementation process will still include “negotiations or leeway for adjustment”. In other words, it is difficult to separate policy formation and policy implementation empirically, for both are ongoing processes open to alteration.<sup>23</sup>

But for analytical purposes, it is worthwhile to make the distinction. To make the policy analysis brief, articulated and more manageable, Ase Gornitzka breaks down the policy process into five separate elements: policy problem, policy objective, policy normative basis, policy instruments and policy linkage (Gornitzka, 1999, 15-21).

Policy problem refers to the societal problem that a policy is intended to remedy. Policies as solutions are relatively stable, but the problems they target may vary both across time and space (Ibid, 17). To policy makers, therefore, it is important that a policy problem be specific to context and time. For example, affirmative action at first targeted the residue effect of racial discrimination, while it later was aimed at the absence of racial diversity. It cannot thus be concluded that the policy is not stable. Rather, this is because, with the change in time and situation, the policy is confronted with new problems.

Policy objective refers to “a statement of desired outcomes” of a policy. “Policies

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<sup>23</sup> Ase Gornitzka, “Governmental Policies and Organizational Change in Higher Education”, in *Higher Education*, Vol. 38 (1999), pp. 14-15.

can vary according to whether policies and programs are directed at changing, adjusting or maintaining behavior of target organizations or groups” or according to “[h]ow many different aspects are intended to be affected” (Ibid, 17). Therefore, the moment a policy objective is decided, the coverage of the policy and the degree of difficulty in achieving the objective, to some extent, are already foreseeable. The aim of the anti-discrimination movement in the United States was to eradicate a social evil that was widespread and perpetuated. The implementation of affirmative action, which was part of the revolutionary and broad project, was bound to be a very tough task.

Policy normative basis refers to the values and beliefs on which policies and programs are based. This aspect can “be read out of” both the policy objectives and the policy problems (Ibid, 19). This means that policy normative basis tends to be less tangible than policy problems and policy objectives. The original normative basis of affirmative action is reflected in the policy objective: elimination of inequality. And it can also be read out of the policy problem: social disparity. The rationale of affirmative action was born of the Civil Right Movement, which was inspired by the American passion for equality. Frictions were not likely to arise had the movement never been institutionalized or had the values underlying the movement never been substantialized into a policy which touches upon people’s interests.

Policy instruments refer to the “fundamental mechanisms by which government influences society” (Ibid, 19). They include government influence over propaganda, law, money and other resources, public bureaucracy.<sup>24</sup> This is the substantial part, without which a policy can only remain empty.

Policy linkage “measures the extent to which the content of policy is breaking with or continuing the content of other government policies” (Ibid., 21). To illustrate, an organization or a group targeted by a policy is suspended in a web woven by old policies. A new policy that agrees with the old policies will be systematically facilitated in its operation with its target. Otherwise, the absence of support from old policies

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<sup>24</sup> “Hood & Margetts Prelims: NATO-scheme” (1983), 21-102, accessed in January, 2008, <http://www.palgrave.com/PDFs/0230001432.Pdf>; as quoted by Gornizka in “Governmental Policies and Organizational Change in Higher Education”, in *Higher Education*, Vol. 38 (1999), 19.



would trap the new policy in a web of resistance.

To sum up, from policy making to its successful implementation there are a number of steps to go. The process varies with the environments in which the policy is implemented and also with the aim of the policy. Underlying a policy are beliefs or values, but ideology alone cannot sustain the policy. It requires the support from something more substantial, such as authority, social consensus, money and administration staff.

## **2.5. Chapter Summery**

Thus far, the theoretical framework has been constructed, which in the later analysis will be the yardstick. Higher education bears features that are Janus-faced and conflicting. This unique policy context often recreates, rather than eliminates, social differences. To solve such social problems, Rawls' difference principle may shed light from a moral perspective, while Rae's recommendation of the maximin criterion may facilitate in practice. If policy-makers seek to reflect the theories in the policy, the policy programs will have to incorporate more substantial elements that are relevant to the complex reality.

To make the discussion more comprehensive, the focus of the study has to be extended from the rationalistic theories to the cases specifically dealing with the policy. Hence the next chapter presents some lawsuits involving affirmative action and the academic arguments pertaining to it.

## CHAPTER 3

### DIALOGUE ON AFFIRMATIVE ACTION

This chapter presents some lawsuits and academic disputes concerning affirmative action. It includes two sections. In the first section, lawsuits on or related to affirmative action are reviewed to demonstrate how the legal interpretation and implementation of the policy has evolved. In the second section, academic arguments are reviewed to present the ongoing dialogue on the policy.

#### **3.1. Affirmative Action in the Supreme Court**

In recent years, few topics in law and public policy have aroused so much controversy as does affirmative action (Lasser, 2004, 121). Although the policy was designed in the Democratic Administrations of Kennedy and Johnson, it mainly grew and was carried out by the Republican Nixon Administration. When President Nixon endeavored to push forward affirmative action during his first two years in office, he got support from the courts. The U.S. Supreme Court has been seen as the guard of minority rights since as early as the late 1930s, but particularly since the Warren Era (1953-1969). By its rulings in school desegregation and civil rights cases, the Court pushed in the direction of race-consciousness so as to realize the promise of equal protection under the law.<sup>1</sup> Since the rise and demise of affirmative action as a public policy were especially influenced by the attitude of the Supreme Court, the following is the narration of several Supreme Court cases, which will show the evolution of affirmative action.

##### **3.1.1. *Brown v. Board of Education* (1954)**

Discussion on civil rights in the modern era cannot overlook the *Brown* case, which ended school desegregation. This issue triggered off a process that led to the civil rights movement as well as a set of federal and state programs that aimed at ending racial discrimination and remedying its effects. Above all, it gave birth to the Civil Rights Act of 1964 (Lasser, 112). It was the Civil Rights Act of 1964 that provided the legal basis

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<sup>1</sup> Ole O. Moen, *Race, Color, and Partial Blindness* (Oslo: Solum Forlag, 2001), 34, 46.

for affirmative action as it is today (Moen, 2001, 4).

### **3.1.2. *University of California Regents v. Bakke* (1978)**

Affirmative action programs made their successful entry into many walks of life in America in the 1970s and had become firmly entrenched by the time of the “backlash” in the field of civil rights in the Reagan Era (Ibid., 15). While the justices wrestled with the problem of defining proper remedies for past discrimination, white plaintiffs criticized affirmative action as “reverse discrimination”. Mindful of history, however, the Court generally condoned affirmative action to make up for past discrimination.

In 1978, the first affirmative action case that came proper before the U.S. Supreme Court was the *Bakke* case, which led to the landmark decision of the Court that prohibits fixed quota in college admissions but affirms the constitutionality of considering race as plus factors. Allan Bakke, whose application for admission was twice rejected, sued the Medical School of the University of California at Davis on the basis of the Equal Protection Clause of the Fourteenth Amendment and 601 of Title VI of the Civil Rights Act of 1964, which provides that “no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance”. The university had a special admission program under which 16 of 100 positions in the class were reserved for disadvantaged minority students. Bakke complained that his exclusion from the program was based on his race.<sup>2</sup>

By the time the *Bakke* case reached the Supreme Court, the support for radical preferential compensation for past wrongdoings was greatly ebbed. The Court was highly divided in this case (Moen, 53, 68). On one point, the court ruled 5-4 that universities “may not set aside a fixed quota of seats in each class for minority group members”. On a second point, the court ruled 5-4 that schools might use a black

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<sup>2</sup> Moen, *Race, Color, and Partial Blindness*, 24, 67;  
Savage, *The Supreme Court and Individual Rights* (2004), 298;  
*ACLU ProCon.org*. “Regents of the University of California Regents v. Bakke (Decided 06/26/78) 438 U.S. 265”, accessed in January, 2008, <http://www.acluprocon.org/SupCtCases/314UCRegents.html>;  
*FindLaw*,. “UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE, 438 U.S. 265 (1978)”, accessed in January, 2008, <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=438&invol=265>.

applicant's race as a "plus factor" in admissions (Savage, 297, 298). Twice Justice John Lewis Powell was among the five-justice majority. It was his "swing vote opinion" that prevented an early termination of affirmative action (Moen, 17).

Justice Powell's "tie-breaking opinion" revolved around the constitutionality of "diversity" in the student body and the benefit that it brings to the Nation. When first announced, Powell was praised for his "moderation and statesmanship". It was said that his "nuanced" opinion illuminated the implementation of the policy in higher education admission.<sup>3</sup> Thus, with his diversity argument, Powell changed the perspective of the Court from the past--to remedy past wrongdoings--to the future goal of constructing a truly multicultural society (Moen, 69).

Critics, however, labeled Powell's compromise as "an intellectual muddle", though a "pragmatic triumph" (Parloff, 2002). The Justice did not very well clarify the category of color-blindness, leaving enough opening up for his legal invention. But the concept of diversity only provides a "legal-philosophical relief", without making clear as to the rationale of affirmative action as a compensatory tool (Moen, 69, 76). Thus, African Americans were no longer the center of affirmative action, but became one of the beneficiary groups together with other minorities regardless of their historical background. Moreover, lack of attention to individual rights makes a serious defect, which has been again and again targeted for criticism in the next decades (Moen, 69).

After the *Bakke* case, the Court made the most significant decision which allows employers and colleges to make a limited use of affirmative action, albeit it has ever since become increasingly difficult for affirmative action plans to pass muster in view of the Constitution (Savage, 297; Lasser, 122). It was the first opportunity to "settle the matter right away, once and for all". In some ways, both opponents and proponents of affirmative action enjoyed a limited victory and at the same time suffered a loss. To

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<sup>3</sup> "In the Supreme Court of the United States", Nos. 02-241 and 02-516 (Feb. 18, 2003) 3, 4, accessed in January, 2008, <http://chronicle.com/indepth/michigan/documents/briefs/respondent/Fortune500.pdf>; Roger Parloff, "Bakke' to the Future" (2002), accessed in January, 2008, <http://aad.english.ucsb.edu/docs/law.com.html>; Akhil Reed Amar & Vikram David Amar, "Some Final Thoughts on the Affirmative Action Ruling and Reliance in a Challenging Legal World" (Jan. 10, 2003), accessed in January, 2008, <http://writ.news.findlaw.com/amar/20030110.html>.

some, this ruling was seen as “depending on context and purpose”. And the Court’s decision lacks “unifying principle”, so that the ground has been left confused for later processes (Moen, 76, 186). As a result, the U.S. Supreme Court so far still finds the *Bakke* case to some extent an unsettled issue (Roger Parloff, 2002).

### **3.1.3. *Hopwood v. State of Texas* (1996)**

The *Hopwood* case challenged “the entire post-*Bakke* record of the U.S. Supreme Court” regarding the constitutionality of using diversity in school admission programs. The Fifth Circuit banned the use of race as a factor in admission. But the U.S. Supreme Court found that the Texas admission program had obvious flaws in it and was not a good case to address the issue of diversity. The Court thus declined to review the case, which in fact ratified the ruling of the Fifth Circuit. This decision effectively banned affirmative action in admissions in the three states over which the Fifth Circuit maintained jurisdiction, though the start of a “revolution” was halted after seven years.<sup>4</sup> The treatment that the *Hopwood* case received at the courts revealed that diversity was a precarious justification of preferential programs.

### **3.1.4. *Grutter v. Bollinger* and *Gratz v. Bollinger* (2003)**

Ever since the case of *Bakke* (1978), arguments for diversity developed through the 1980s and 1990s to become the main theme in justifying affirmative action (Savage, 297). New challenge to this rationale did not come until the case of *Grutter v. Bollinger* and *Gratz v. Bollinger* (2003) came to the Supreme Court. The two cases revolved around the question of whether race could be considered in school admissions in order to maintain student diversity (Moen, 18).

The Court’s decision supported “carefully tailored affirmative action policies in higher education to promote racial diversity on campus” in the case of *Grutter v. Bollinger*, while it rejected “the use of race in a more blunt, less individualized manner

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<sup>4</sup> Moen, *Race, Color, and Partial Blindness*, 186, 17;  
*The Center for Individual Rights*, “Hopwood Ends Affirmative Action in 5<sup>th</sup> Circuit”, accessed in January, 2008, <http://www.cir-usa.org/cases/hopwood.html>.

in educational admissions” in the case of *Gratz v. Bollinger* (Savage, vii). This decision affirmed the approach of Justice Powell in the *Bakke* case (Ibid., 303). Nevertheless, there was a turnabout: from a group-based consideration to an individual-based consideration. According to Justice O’Connor, colleges and universities may consider an individual minority applicant’s race as a plus factor, but a “mechanized selection” system is not justified. In other words, consideration of race in college admission is not mandatory, but they may do so (303, 304). This transformation means that the factor of race became increasingly downplayed. Thus, while the Supreme Court preserved affirmative action in higher education, the legal justification of the preferential programs took on more rhetorical and symbolic meanings.

### **3.1.5. Section Summery**

Opponents of affirmative action criticized that the policy shifted from a middle-of-the-road measure into preferences. In the process, the Supreme Court acted as the final arbiter, adapting the color-blind Constitution to the needs of a very color-conscious society (Moen, 25, 21). Two Court rulings serve as the milestones in the process, the *Bakke* case in 1976 and the *Bollinger* case in 2003. In the former case, the notion of diversity was invented, with which the focus of consideration shifted from the past to the future. In the latter case, with close scrutiny, the use of race as a plus factor in school admission increasingly hinged on individuals rather than on groups.

Affirmative action arose immediately following the civil rights era of the 1960s and experienced a seeming decline at the turn of the millennium. The term itself also underwent a transformation “from a ‘color-blind’ to a ‘color-conscious’ concept and then back again as if by a natural-law pendulum swing of history” (Moen, 13, 14).

### **3.2. Academic Debate**

Outside the Court, a debate concerning affirmative action has been going on in academic circles. Opinions are various, controversial, sometimes even totally unrelated. To give the debate a relevant, clear-cut presentation, the major opinions are grouped into five separate discussions, as if holding five seminars, where the opponents, headed by

Terry Eastland, and proponents, headed by Barbara R. Bergmann, can exchange their arguments regardless of the chronology.

### **3.2.1. On Equal Individual Rights**

One assumption is that affirmative action is out of time and unfair. Terry Eastland cites the conclusion of a 1993 study: Prejudice is no longer dominating, though it has not disappeared yet (Eastland, 156). As supporting evidence, William Julius Wilson refers to the increasing enrollment of blacks in colleges and universities as well as the rising number of blacks in professional, technical, managerial and administrative positions (Wilson, 153). Louis P. Pojman stresses individualism as opposed to affirmative action: Compensation should be individual and specific; otherwise the poor white youth will be reduced to “the new pariahs” on the job market.<sup>5</sup> According to these opponents, the major criticisms against the preferential policy are because of its violation of such “American Creed” as fairness and fair play rather than out of self-interest. And wrongs in this imperfect world sometimes cannot be compensated. The best that can be done is to focus on specific cases of discrimination and appeal to weapon of the law. The presumption that the social system is characterized with discrimination and then preference should be applied will only foster hatred and division (Pojman, 1997, 184; Eastland, 153, 157).

This charge that affirmative action violates the American creed of equal individual rights is brief and simple. Yet, it is severe and appears unassailable. Equality and individualism are so deeply entrenched in American culture that proponents of affirmative action are bound to produce long and heavy arguments in order to countercharge. As Bergmann concedes, proponents of affirmative action have to face two serious challenges: 1). Fairness to the individual displaced; 2). The violation of a procedure that looks fair (Bergmann, 99-100). Especially, evidence has to be produced that *present* compensation is relevant to *past* discrimination.

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<sup>5</sup> Louis P. Pojman, “The Moral Status of Affirmative Action”, in *Affirmative Action: Social or reverse Discrimination?* (Ed.) Francis J. Beckwith & Todd E. Jones (New York: Prometheus Books, 1997), 184, 187; originally published in *Public Affairs Quarterly* (OH: Bowling Green State University, Philosophy Documentation Center, 1992).

Bergmann first of all aims at the individualism argument and raises the question whether it is possible to limit our thinking and talking only to individuals (Ibid., 69). Her challenge finds justification in Savage, who writes, “Laws by their very nature distinguish between categories of people, classes of property and kinds of action. For the most part, such distinctions are desirable and necessary in an organized society” (Savage, 254).

But grouping, Bergmann points out, can be applied negatively as well as positively: On the one hand, group names and reputations help us to handle the enormous amounts of information in our lives. On the other hand, grouping also carries dangers because human beings tend to “overgeneralize” about groups and to impute the sins of some members of a group to the whole group. She gives both a positive and a negative example: In the first example, affirmative action helps groups, that is, assists those who have been hobbled because they belong to a certain group. In the second example, a racist would look down on all black applicants because black applicants as a whole are considered to have low potential. In the latter example, the negative attitude is bound to permanently reduce black people in plight (Bergmann, 69-71).

Bergmann also points out that group-based consideration helps expose invisible biases, as is evidenced by the finding in Crosby’s experiment: It is comparatively easier to judge whether a system is rigged in favor of one group over another when events are reviewed in collection than when events are separated from each other. But in reality, most hirings and promotions happen separately, a condition under which prejudice can easily set in. Affirmative action properly acts against the tendency to look at decisions as unconnected (Ibid., 74-75). On the contrary, the individual-based measures to focus on specific case of discrimination as is suggested by Eastland, are hardly feasible. As Tom L. Beauchamp remarked by referring to the editors of the *New York Times*, to identify individual victims of discrimination would be “the project of a century”, and most victims of discrimination would be entitled only to legal rights symbolically.<sup>6</sup>

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<sup>6</sup> Tom L. Beauchamp “Goals and Quotas in Hiring and Promotion”, in Beckwith & Jones, 215; originally published in Tom L. Beauchamp and Norman E. Bowie eds., *Ethical Theory and Business* (1986), 5<sup>th</sup> ed..



Paul W. Taylor reminds us of the actual existence of the group: a group of victims “created” by the original unjust practice.<sup>7</sup> But this group is not organized as a state, a church or a corporation, that is, an institutional entity. The only way to make up for the sins would be to distribute the reparation to members of the group (Moen, 215). What is more, group compensation is not without precedent: West Germany compensation to Israel and the U.S. government compensation to the Japanese Americans (Bergmann, 125).

Paul Woodruff associates a discriminated race to an individual member of the race: The enslavement of individual blacks is related to blacks as a race. Slavery is imposed upon the slaves. But enslaving people *for their race* constitutes an additional injustice to slavery. The second injustice not only harms slaves, but also stigmatizes every member of the race. That is, slavery was imposed upon black individuals, while stigma was imposed upon the race of African Americans. Therefore, there are at least two wrongs to be rectified: (i) all slaves deserve redress for enslavement; and (ii) all members of the race deserve redress for discrimination.<sup>8</sup>

As to the charge that affirmative action violates a faire procedure, counterarguments are given from several perspectives. These arguments distinguish a compensatory program from discriminatory practice and point out the fundamental difference between the two. Stanley Fish refers to history as a powerful rebuttal, pointing out that people’s failure to see the difference between the former and the latter is because they have forgotten history and therefore are “morally confused”.<sup>9</sup> James W. Nickel focuses on that the basis for discrimination and the basis for compensation are different, suggesting that the basis on which a black is compensated for is not that he is black, but that he has been exposed to ill treatment because of his skin color.<sup>10</sup> Richard

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<sup>7</sup> Paul W. Taylor, “Reverse Compensation and Compensatory Justice”, in Steven M. Cahn ed., *The Affirmative Action Debate* (New York: Routledge, 1995), 14; originally published in *Analysis* 33 (1973).

<sup>8</sup> Paul Woodruff, “What’s Wrong with Discrimination?” in Cahn, 40, 41; originally published in *Analysis* 36 (1976).

<sup>9</sup> Stanley Fish, “Reverse Racism, or How the Pot Got to Call the Kettle Black”, in Beckwith & Jones, 143; originally published in *The Atlantic Monthly* (November 1993).

<sup>10</sup> James W. Nickel, “Discrimination and Morally Relevant Characteristics”, in Cahn, 3; originally published in *Analysis* 32 (1972).

Wasserstrom's stress is on consequence: Discrimination will ultimately deprive the minorities of their social and political power, while the current preferential program just does not have the same vicious results.<sup>11</sup>

Relating compensatory programs to the society at large, Wasserstrom and Paul Woodruff find no such danger that the programs could upset equity, or knock the society off balance. The underlying evil of racial discrimination is that it is part of a larger framework that systematically and unjustifiably concentrated social benefits in the hands of white males.<sup>12</sup> In contrast, a compensatory program is not part of such an evil scheme. Being compensatory, affirmative action is limited to a scale that will not unfairly reduce the respect of those who offer the compensation (Woodruff, 1976, 41). Even if all the affirmative action programs are lumped together, there is simply no such possibility that the advantaged group could be reduced to the kind of disadvantaged position that the dominant social institutions and ideology have assigned to blacks (Wasserstrom, 1978, 200).

George Sher is even more positive about affirmative action and sees it as a way of restoring equity. In his view, compensatory programs, capable of neutralizing the “*present* competitive disadvantages” caused by those “*past* privations”, will restore equal access to those opportunities that require competitive efforts. He thus suggests removing the means-based equality to arrive at fairness. That is, if what is deprived of blacks is just the ability to compete on equal terms, then the best way to solve the problem is just to remove the requirement of competing on equal terms.<sup>13</sup>

To counteract the assertion that discrimination has passed into history, Goldman reminds us how difficult it is for *the present* to be extricated from *the past*, since long lasting poverty tends to deprive its victims of their motivation (Moen, 223). Here Goldman responds to the 1966 Coleman Report, which identified a “culture of poverty”

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<sup>11</sup> Francis J. Beckwith & Todd E. Jones, *Affirmative Action: Social or reverse Discrimination?* Francis J. Beckwith & Todd E. Jones eds. (New York: Prometheus Books, 1997), 169.

<sup>12</sup> Richard Wasserstrom, “A Defense of Programs of Preferential Treatment”, in Francis J. Beckwith and Todd E. Jones, 199; originally published in *National Forum; The Phi Kappa Phi Journal* 58, no. 1, Winter 1978.

<sup>13</sup> George Sher, “Justifying Reverse Discrimination in Employment”, in Beckwith & Jones, 230, 231; originally published in *Philosophy & Public Affairs* 4, no. 2 (Princeton, New Jersey: Princeton University Press, 1975).

that exerted greater influence upon blacks because of a higher concentration of poverty among blacks.<sup>14</sup> A similar argument can also be found among the intellectuals in the civil rights movement who proposed series of theory during the late 1960s and early 1970s. According to these theories, persistent racist thoughts and behaviors were so deeply entrenched in institutional cultures and standards that discrimination was perpetuated even when contemporary individuals did not have conscious intention of racial discrimination (Graham, 77). Even Eastland, an opponent of preferential programs, agrees with Judge Sparks and admits the leftovers from history--the reduced educational achievements of the present generation of blacks and Mexican-Americans resident in the state of Texas (Eastland, 75).

To the charge that it is unfair for better quality candidates to be displaced by less qualified ones, Wasserstrom cautions against the possibility of deviating the debate from the issue of fairness. He claims that it is inconsistent to put too much attention to qualifications. If the focus only revolves around achieving the greatest efficiency, then the discussion is far distracted from the issues of justice or fairness that have been so much exploited against affirmative action (Wasserstrom, 201).

Bernard R. Boxill refers to John Locke's theories on the state of nature and a contract society, and assumes that the replacement of some whites by blacks is part of the contract society, in which social members have the obligation to help each other. To interpret his point, he starts by making the difference between reparation and compensation: The former is due in case of injustice. For example, in the state of nature, one is entitled to reparation after he is injured. The latter may be due in the absence of injustice. Such as in a contract society, compensation applies because social members are obliged to help one another. Compensation and reparation aim at two different requirements of justice.<sup>15</sup> That is, even without taking into account the discriminatory history, compensation is applicable to American society to preserve equality. In this case, it is possible that an individual who has never been involved in racial discrimination

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<sup>14</sup> Doug Mann, "The Coleman Report" (29 Oct 2004), accessed in 2007, <http://educationright.tripod.com/id330.htm>.

<sup>15</sup> Bernard R. Boxill, "The Morality of Reparation", in Cahn, 109-112; originally published in *Social Theory and Practice* 2, 1972.

may have to bear inequality of opportunity.

To sum up, the opponents and proponents exchange their arguments on three points: individualism, fairness and the relation between the past and the present. The arguments to counteract critics of affirmative action are as follows:

1. Although individualism is the national creed, the society has actually *created* a group of people who are stuck in a disadvantaged position. To such a reality, a public policy strictly limited to individual thinking is not feasible.
2. Since equal opportunity is only an illusion in our society, the notion of different treatment applies to the imperfect society, which restores rather than upsets equity.
3. Although institutional segregation has passed into history, a “culture of poverty” continues to trap the underclass. Since the blacks today bear the burdens of the past and consequently lack the ability to compete on an equal basis, it is justifiable to remove equal treatment.

### **3.2.2. On Diversity**

After the notion of diversity was invented, affirmative action was disjointed from history, the initial justification of the program. This, to a great extent, leaves the program open to criticism. Eastland from the opponent side points out that the remedial rationale requires that the beneficiaries of affirmative action be victims of discrimination (Eastland, 80). They are presumably disabled, or regarded as “shackled runners” (108). However, the diversity rationale, as Justice Powell put it, was detached from remedying discrimination. It can be expected that in most admissions, educational diversity will turn out to be only racial and ethnic diversity (82, 79, 80). What is more, diversity-based affirmative action will eventually become perpetuated while, theoretically speaking, remediation should be limited in duration (108).

To this argument, Bergmann from the proponent side can readily rebut on the basis of the democratic discourse. Her argument is based on the belief that the groups who have controlled the best positions are not the only ones fit to them. The exclusion of certain kinds of people from certain positions in American society will result in grief and harm for many and those exclusions ought to be redressed within the limits of ethics

(Bergmann, 84,13). But a democratic ideal must manifest itself as something substantial rather than only symbolic. Taking education as an example, Martin Trow claims that the final results of an equal opportunity policy should be substantially reflected in the equal accomplishment of different social groups and strata (Trow, 1973, 45). As a substantial index, diversity tests if an organization has adhered to the principle that all types of persons should be included in the game. It thus prevents power concentration in the hand of any one group and extends “sympathetic and fair treatment” to all social groups (Bergmann, 106).

Diversity is morally justified in that underrepresentation of certain groups in certain positions is irrelevant to their lack of competence (Bergmann, 13). Again, taking education as an example, any difference in the proportions of university students from different social background and the difference in their eventual achievements may reflect patterns of social discrimination rather than differences in individual ability (Trow, 1973, 45). Opponents, however, think otherwise. Pojman suggests that unequal results may come from “innate differences” between races, sexes and groups. It is hence advisable not to appeal to preference but to be “*open*” to this difference, which may have led to an overrepresentation of certain groups in certain areas (Pojman, 180). The disagreement regarding the causes of the racial differences, the discrimination argument versus the innateness argument, may entail opposite implications for policy makers: to eliminate the differences or to make use of them.

In the 1990s, one new element emerged in the public debate: Four-fifths of the new immigrants, who come from Latin America or Asia, were entitled to affirmative action preferences (Graham, 129). The task is made more problematic today by the increasing cases of mixed-race marriages, which makes it unusually difficult for the government to decide upon the targets of the favor (Eastland, 158). Worse still, the preferred immigrants are in a position to vie with African Americans, the originally target of affirmative action (Eastland, 147; Graham, 7). By the end of the 1990s, the surge of immigration had weakened affirmative action’s original, African American-centered rationale (Graham, 10). Pojman, though admitting “the value” of diversity, pronounces that diversity for diversity’s sake is “moral promiscuity” (Pojman, 185). Even Richy

Gaull Silverman, a supporter of affirmative action, admits that immigrants' involvement is "the ultimate nightmare" of affirmative action (Graham, 2, 3). It thus raises such questions as how to limit the project within a manageable scope once you have started it (Pojman, 192).

In spite of the complicating situation, proponents of affirmative action see racial and ethnic diversity as "an asset" and embrace the goal of diversity as a valuable and worthy objective in itself. It is an ideal and noble goal to pursue a truly multicultural society in the future (Moen, 69, 210, 237). Without diversity, there is little possibility for members of various groups to share the different points of view, insights, values and knowledge of the world, whereas the construction of racial and ethnic diversity will in the long run create "equal opportunity" rather than "equal result" (Bergmann, 106; Moen, 210). The need for diversity provides the strongest support for affirmative action in higher education admission, because universities train leaders in the professions and in public life. With only white leaders generated from a de facto segregated society that have been insulated from the black bloc, it is not likely that the deeply entrenched racial division that are so annoying can be quickly erased (Bergman, 118).

To sum up, diversity makes the focus of the hassle between the contestants. Proponents hold that racial and ethnic diversity enhances fairness and breaks stereotypes. More important, it embodies human ideals whose values are noble in themselves. Opponents, on the contrary, hold that the discourse of diversity not only violates such American creeds as fairness and individualism, but also has strayed away from the original compensatory rationale. Worse still, its entanglement with immigration surge seems to have pushed affirmative action programs beyond a manageable scope.

It thus can be seen that the relationship between affirmative action and the diversity discourse is paradoxical: affirmative action accomplishes racial diversity, while the latter justifies the former; but in the process the latter has nearly bankrupted the former.

### 3.2.3. On Race-based versus Class-based Programs

At one point, the dispute revolves around such a question as whether preference should be based on race or class. Some critics of affirmative action propose a class-based system to substitute for the color-conscious policy (Moen, 229; Wilson, 158). Instead of affirmative action, they support programs that benefit blacks such as improvement of inner-city schools or tax breaks (Eastland, 157). Even Dinesh D'Souza, a fierce opponent of affirmative action, urges that universities should have preferential programs, but the beneficiaries should be selected by socioeconomic criteria rather than by race (Beckwith & Jones, 1997, 29).

The advocacy for class-based preference is justified by the assertion that race-based programs are irrelevant to the plight of the underclass blacks. By the mid-1990s, the total black population was as large as 31 million, in which the so-called underclass of blacks made up 2 to 3 million. By the evaluation of Eastland, affirmative action rarely better the conditions of this underclass (Eastland, 154-155). Peter H. Schuck claims that affirmative action is irrelevant to the root cause: inferior schooling, and therefore it is only a kind of "poultice". Even most proponents would probably admit that it fails to reach the core problem (Schuck, 2002, 126).

The reason of this failure, in the opponents' view, is due to the disregard of class differences. Eastland points out that taking advantage of affirmative action requires "the threshold skills" (Eastland, 77, 155). Such skills as education, organization, lobbying and litigation are skills possessed by the middle class, with which the world of the truly disadvantaged is unacquainted (Graham, 169). Shelby Steele refers to the drastic drop in black admission to selected universities once racial preferences are banned as a confirmation that affirmative action has little effect upon the underclass, for most blacks who apply to selected schools are from middle-class and advantaged backgrounds.<sup>16</sup> More dangerous than that, the opponents claim that racial preference tends to concentrate the benefits on the fixed advantaged group and hence entrench the established hierarchy. As Thomas Sowell concludes, those above the middle class are

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<sup>16</sup> Shelby Steele, *A Dream Deferred* (New York: Harper Collins Publisher, 1994), 93.

lifted up by affirmative action while the underclass are reduced.<sup>17</sup> Eastland remarks that today many, perhaps most, preferences in admissions are granted to minorities who are comfortably settled in the mainstream, the children of middle- and upper-income families. And considering the economic progress that blacks have gained, ending affirmative action should have little difficulty (Eastland, 76, 154).

The advocacy for class-based preference may seem plausible, because at all levels of the society, it is apparent that class differences are associated with color. Indeed, as Richard D. Kahlenberg points out, it is because of this apparent association between race and class in the United States that affirmative action has persisted so long.<sup>18</sup> It therefore follows to conclude that class-based preference would still concentrate resource on blacks, and on black underclass in particular.

However, currently there are programs targeting the underclass that have been ongoing for decades. Ironically, they bear the very defect, lack of effect and efficiency, which the opponent side has frequently assigned to affirmative action. Looking back on what happened since mid-1960s, Bergmann points out that great resources have been spent on training programs for the disadvantaged, while the income increase for the trainees have not been substantial. What is more, testifying the eligibility of the applicants for class-based preference would create tremendous workload for the executive institution and have to wrestle with fraud (Bergmann, 177, 167). Thus Lemann questions: "If affirmative action were entirely abolished, does anyone really believe the government would undertake, say, an expensive upgrade of education for blacks as a more meaningful substitute?"<sup>19</sup> Without detailed and specific arrangement concerning such substantial aspects as manpower and finance for this tremendous, all-rounded project, the suggestion for a class-based program could only turn out to be empty or even hypocritical.

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<sup>17</sup> Thomas Sowell, "From Equal Opportunity to 'Affirmative Action'", in Beckwith & Jones, 110; from *Civil Rights: Rhetoric or Reality?* by Thomas Sowell (New York, NY: William Morrow & Company, Inc., 1984).

<sup>18</sup> Richard D. Kahlenberg, *The Remedy: Class, Race, and Affirmative Action*. New York: Basic Books, 1996, as quoted in Ole. O. Moen, 230.

<sup>19</sup> Nicholas Lemann, "Taking Affirmative Action Apart", in *Affirmative Action: Social or reverse Discrimination?* (Ed.) Francis J. Beckwith & Todd E. Jones (New York: Prometheus Books, 1997), 51; originally published in the *New York Times Magazine* (June 11, 1995).



There are certainly advocates of class-based preference who are true and serious in their search for solution to the problems (Moen, 232). In spite of that, there are quite a few flaws in their advocacy. First, concentrating only on the problem of class may conceal the problem of race, which often crosses the border between classes. By the observation of Kahlenberg, in spite of the growth in black middle class, many black families are hardly well established in their middle-class status and get little financial help from their predecessors (Kahlenberg, 1996, as quoted in Moen, 230). Convinced that racism is so widespread in this country, Fish finds it justified to include upper-and-middle-class black people as beneficiaries of preferential programs. Otherwise, they are not likely to enjoy the same privileges and opportunities that are granted to their white counterparts (Beckwith & Jones, 29). It therefore can be expected that a program based on disadvantaged socioeconomic status would not touch upon the discrimination-caused segregation (Bergmann, 168).

Second, those who stress the overlap between race and class fail to track down the cause for this overlap. They seem to have forgotten that it is race that has largely shaped the current class pattern of the United States. To African Americans, it is not an egg-and-hen story: racial oppression came before class oppression. A proposal for a political class-based union between the poor of both races may be conceived with little sense of history. Even though those who raise the proposal may be honestly and sincerely seeking for solutions of the problems, it seems too much of optimism, even nearing naïvety. It seems also to have overlooked the resistance to class-based preference in college admissions (Moen, 232).

Third, the charge that affirmative action leaves intact the root cause of the black plight has created a misconception about the mission of the policy. To reach the underclass would require the full mobilization of the government for urban renewal and public education at the ground level, which is not the principal mission of affirmative action (Moen, 205). Vice versa, a program that specially aims at the underclass would not do the job that affirmative action is supposed to do, though such a program would be a “worthwhile companion program” to support affirmative action (Bergmann, 168).

Fourth, a class-based program aiming at the black underclass may just miss its

target and fail to solve class problems. Bergmann analyzes the demography of the United States: A majority of the poor population is white non-Hispanic; African Americans constitute only 28 percent of this community (Ibid., 167). That is, blacks, a minority of the national population, will continue to be the minority of the disadvantaged population. In reality, African Americans even have difficulty getting 28 percent of the positions granted to them through class-based programs if no consideration is given to the element of race. In case of valuable opportunities, white males might compete for these slots and get almost all of them (Ibid., 167). In other words, since the bottom stratum of the society is also hierarchical, blacks will remain the underclass within the underclass, unless lifted with race-based assistance.

To sum up, the argument for class-based preference is justified by the fact that race-based programs fail to reach the most disadvantaged but only benefit the middle-class blacks. It thus not only fails to eliminate the root cause of black plight, but also entrenches class stratification. This argument is also justified by the overlap between race and class. This attitude may be taken as a concession on the opponents' side in contrast to those who reject any preferential programs but rigidly stick to the creed of equal opportunity and individualism. At least these advocates of class-based preference agree that the playground is not level and begin to accept a certain type of group consideration.

The proponents' side, however, find that class-based preference will not benefit the most disadvantaged blacks due to the feature of United States' demography. It not only helps little to solve the problem of class, but will also leave the problem of race intact. As such, there are several flaws with the class preference arguments:

1. It is not reasonable to exclude middle-class blacks from the favored group because of the existing racial discrimination;
2. Concentration on class shuns the problem of race, which is inextricable from the problem of class;
3. A class-based alliance between races is an illusion, with little regard to the process of class pattern formation in history;
4. Class-based programs tend to lack efficiency and effect;

5. Advocates of socioeconomic preference confuse the mission to aid the poor with the mission to select the elites from the minorities. They therefore fail to see the difference between social welfare and political democracy.

Advocates of race-based preference, on the other hand, do not shun the problem of class. Rather, they connect racial problem to class problems. The solution to the former will fundamentally remove the latter, since the former is to a great extent the origin of the latter. Unless there is definite evidence that racial discrimination is gone, and with it gone the lingering effects, class preference advocacy is hardly well grounded.

#### **3.2.4. On Meritocracy versus Mediocrity**

At the time of the civil rights revolution--and by liberals, it should be noted--a formal meritocracy based on education and standardized testing was institutionalized. To the blacks, however, this change was a bad news, because it allocated opportunity according to performance in education, where blacks were weakest (Lemann, 1995, 42, 43). On this topic, the arguments of the two sides revolve around two points: the fairness of the academic standards and the quality of higher education products.

Academic qualifications make up effective means to dismantle hierarchies based on class, race and gender, and therefore constitute a very important part of democracy. In a discussion as such, it tends to be easier for the critics of affirmative action to find legitimacy. However, the proponent side refuses to concede. Bergmann claims that standards of merit rest on the methods used and cannot be free of error and subversion (Bergmann, 105). Nicholas Lemann points out the culture bias in academic tests and processes. Judgment of people based on education is greatly decided by their family background (Lemann, 44). On the opponent side, on the contrary, Sowell finds test scores can better predict college performance for blacks than for Asians and whites. To prove the validity of academic standards, he refers to the case at the University of California, Berkeley: Where the freshman class closely responds to the actual ethnic distribution of California high school students, more than 70 percent of blacks fail to graduate (Pojman, 194). That is, academic score at higher education entrance can indicate the potential of black students with considerable accuracy. Of course, the

evidence provided by Sowell is limited to observation within a limited period of time, which has to be further interpreted before it becomes meaningful.

The other point of dispute is on the quality of higher education products. The proponent side accepts affirmative action on the basis that all people admitted are qualified. Opponents, however, refuse to accept that those admitted are just “qualified in the abstract”. Eastland insists that, since the competition is for limited resource, those admitted should excel other candidates (Eastland, 11). Pojman is concerned about the quality of the products generated from higher education institutions, since affirmative action programs tend to appeal to “the lowest possible common denominator” (Pojman, 190). Eastland reminds the public not to forget how people routinely make judgments about quality when they seek the services of a doctor or lawyer (Eastland, 11). Shelby Steele does not agree with medical schools’ argument that they lower standards for minorities in order for minority neighborhoods to have enough doctors. He sees it as a negative implication about the quality of services provided to minority neighborhoods (Steele, 1994, 53).

Bergmann starts her rebuttal by looking at the two education areas that have been involved in lawsuit: medicine and law. She points to the fact that almost all the surgeons in the United States are white males (Bergmann, 20). She also points to the large law firm, with no active affirmative action program, that has never hired a women or a black person as a lawyer (168). As to whether affirmative action has negatively affected education quality, Bergmann suggests listening to what the teaching staff has to say. A scientist who teaches at Brown gives absolutely positive comment on the talents and efforts of the black students admitted under affirmative action: They are not “underachiever”. Rather, most of them are “overachievers” (119).

Bergmann doubts that the absence of affirmative action in the elite professional circle will guarantee that the selected are the best (Ibid., 20). But since this discussion is mainly on education, whether affirmative action should be applied in the recruitment of elite professionals is beyond the consideration of this thesis. But Bergmann does remind us of a confusion in the opponents’ arguments: they have lumped together all forms of affirmative action programs and have confused programs implemented in the higher

education system and those implemented in the employment market. In the former case, conflicts, manifested as law suits, tend to occur in elite universities. As Eastland observes, the more selective the school, the more race counts in admissions decisions. Most students are attending colleges and universities where race matters very little in admissions (Eastland, 88). In the latter case, affirmative action is mainly implemented in such non-elite areas as construction or police, rather than in such elite circles as surgery and large law firms (Bergmann, 20, 168). In other words, affirmative action is applied in higher education admission, not applied in professional qualification grant. Therefore, a mediocrity is not likely to enter such elite areas as doctors or lawyers.

Pojman refers to the field of sports, where blacks are over-represented without affirmative action, and then argues: If merit has the priority in sports, it is questionable when it is not emphasized at least as much in education and industry (Pojman, 192) In response, Bergmann points out that affirmative action is by no means the only practice that violates the merit system (Bergman, 24). She refers to veterans' preferences and the preferential admissions of the children of alumni to Harvard as examples of such violations (109). Such practice seems to have aroused little complaints, even among those directly affected in a negative way (25). She believes that affirmative action is so much criticized because the merits of black and female candidates are habitually disregarded (13). In other words, what incurs so much complaint is the fact that affirmative action overturns the stereotypes.

Pojman touches upon the issue of fairness by the assertion that our society has promised appropriate award if people have achieved certain levels of excellence (Pojman, 183). He assumes "the anti-meritocratic (desert) argument" as unfair, because it holds that those who excel do not merit their intelligence, superior character, etc., and that it is reasonable to grant these chances to less but still qualified, even if minimally qualified blacks and women. He defines this kind of argument, which is found in the writings of John Rawls, as "social utility" (185). Bergmann suggests balancing the value of quickly ending segregation with the value of a merit, perhaps an imperfect merit system (Bergmann, 24). Pojman would, of course, define Bergmann's attitude as "social utility" (Pojman, 185). But in doing so, Pojman has made a confusion: the confusion of

social justice with social utility: The former requires that everyone gains from economic and social inequalities, while the latter tolerate compensating for the losses of the victims by advancing the expectations of representative men (Rawls, 65).

To sum up, meritocracy is vital to social mobility and to the construction of a modern, democratic society. In this case, the meritocracy argument may be taken for granted. However, what makes the opponents' arguments not so convincing are two confusions: First, they have confused affirmative action in university admission with affirmative action in the labor market, which target different group of subjects and different levels. Second, they have confused the principles of social justice with the principle of social utility. The former is a social contract theory, while the latter is a notion incompatible with the social reciprocity. Proponents, on the other hand, not only give evidence that students admitted under affirmative action are not problematic in quality, but also alert to the subjectivity in academic standards. Balancing the arguments of both sides, the proponents seem to get the upper hand.

### **3.2.5. On Stigma versus Respect**

According to Leon Wieseltier, a dilemma of the newly emancipated and the newly enfranchised group is that their collective memory as an oppressed people can be both a treasure and a trap: An honorable life cannot be achieved if they retain the memory "too little"; a normal life will be ruined if they stick "too much" to the memory (Pojman, 187). But how does one designate the extent that amounts to "too much"? To the opponents, affirmative action is based on, and in turn has engrained, too much memory of the oppressed past. They have identified two harms that affirmative action brings to African Americans: One is the tendency of self-doubt, dependency and entitlement generated among affirmative action beneficiaries; the other is the stigma imposed upon blacks as a whole when only a few members receive the favor (Eastland, 196, 198).

Preference programs, according to Shelby Steele, will wear away the self-respect of its beneficiaries, because affirmative action strengthens a kind of victim mentality by instilling into blacks that they can gain more by demonstrating their suffering,

degradation and helplessness than by discipline and work (Pojman, 188). Other opponents of affirmative action also claim that the programs injure African Americans by infusing into them a “falsehood” that they are all victims of white oppression (Bergmann, 33). They criticize the program in that beneficiaries tend to use their disadvantaged status as a “crutch” and in turn develop an “entitlement mentality”, which dampens people’s ambition. In this way, the program, which was originally designed as a temporary remedial measure, will create a “self-perpetuating cycle” (Moen, 208). That is, blacks are encouraged to “remember too much” of the past so that they may never return to a normal life.

To give an example of blacks’ dependency and entitlement, Steele cites Bill Stephney, who criticizes the society for breeding this “money-for-nothing welfare mentality” and blames blacks for adjusting themselves to it rather than looking for better opportunities (Steele, 29). Stephney asserts that what has removed African men from their responsible position in their families is the “welfare/child-rearing system” rather than the waning work opportunities in urban America (25). Naturally, the right remedy in the view of the opponents would be “increasing resources for inner-city schools” (Eastland, 156-157). Any way, effort is demanded in educational development before the tertiary education (Steele, 33).

The other harm done by affirmative action is the stigma imposed upon blacks as a whole although only a limited number of the race receive the favor. Eastland explains that in the implementation of affirmative action, the race and ethnicity of the beneficiaries have to be identified and minority groups intended for the favor have to be notified (Eastland, 8). This practice even stigmatizes the non-beneficiaries (198). Pojman terms it as “reverse discrimination”, which suggests that, since these minorities need so much extra help, discriminations against them are reasonable. As a result, beneficiaries of affirmative action who hold high positions will not have the respect equivalent to their rank, because it is presumed they hold those positions simple because of affirmative action (Pojman, 179).

The proponents’ arguments are oriented to the above-mentioned two harms. Concerning the first harm, one confusion on the opponents’ side must first of all be

clarified: the confusion of affirmative action and other social welfare programs. What Stephney labeled as the “money-for-nothing welfare mentality” is by no means generated from affirmative action. The “welfare/child-rearing system” which has rid African men of their responsibility, as Stephney condemns, favors those locked up in the core of poverty. Affirmative action, in contrast, sets up “threshold” to exclude those who lack ambition and motive. Elsewhere, this threshold often leads to criticism that affirmative action only favors the advantaged. In here, it at least fends off the conviction that the program generates dependency mentality.

In fact, association between welfare programs and the mentality of dependency and entitlement, if any, all the more justifies affirmative action. Bergmann points out that admittedly many of the black teenagers should not be blamed for having relatively poor preparation for higher education. In contrast to assistance before college, affirmative action programs on campus are in a sense an alternative to “jump-start” or speed up the process of reducing racial disparities by enrolling more black youth of the current generation rather than waiting for their offspring who have better pre-college preparation (Bergmann, 121). That is, affirmative action lends a hand as early as possible to those black youth who refuse to indulge in dependency.

According to Lemann, it is the exclusion of blacks from the mainstream that may reduce them to dependency and entitlement. He predicts that abolishing affirmative action could lead to an increase, rather than a decrease, in the kind of black demands for reparation and preference that whites look on so negatively: if you’re completely excluded from the system, then you will lose the motivation to seek inclusion in it (Lemann, 52). According to Cornel West, it is the loss of hope that has dismantled the safeguards against nihilism, the gravest threat to the black community. Only when hope and meaning keep on, will the possibility of overcoming oppression persist (Beckwith and Jones, 27).

Affirmative action may increase the hope of those who are already involved in pre-college programs. Bergmann, comparing affirmative action with other training programs for the disadvantaged, finds that since mid-1960s the latter have hardly yielded impressive results in terms of increased earnings for the trainees. The reason lies



in that the education-improvement approach fails to evidence to the young trainees that they have the hope of getting a good job at the end of the program and consequently fails to encourage them to put great effort in the training (Bergmann, 177, 178).

The other harm that the opponents attribute to affirmative action is its stigma to blacks as a whole. But it seems to be against common sense to stigmatize someone by elevating him or her from a low position to a high position. Eastland predicts that there would be many fewer blacks enrolled in the nation's most elite schools tomorrow if affirmative action were ended today (Eastland, 156). Naturally, Bergmann would follow up with such a question as "whether African Americans would be a less stigmatized group if there were fewer black undergraduates at Yale, fewer black Yale graduates and fewer black members of the Yale faculty". She does not believe that affirmative action would lead people to think unfavorably of blacks if they initially had perfectly positive attitudes toward them (Bergmann, 28). Based on a survey of opinions, she concludes that people were negative to affirmative action not because they stick to the principle of fairness or because they wanted to rid blacks of the stigma of "affirmative action babies", but because they did not want to see the wreck of male or white dominance (150). That is, what turns them against affirmative action is their inclination to conserve stereotypes.

In fact, through the destruction of stereotypes, affirmative action restores pride to the discriminated race: Black graduates from an elite university would enjoy a "'bonus' effect of success" (Moen, 239). It is logic because affirmative action is about lifting them to a position of equality and self-respect. This is not only a matter of increasing their financial gains which would otherwise be reduced because of discrimination (Bergmann, 17). Affirmative action deliberately aims at something intangible and elusive, as well as tangible and substantial facts.

To sum up, notions such as dependency mentality and reputation stigma tend to refer to something intangible. Discussion on such topics tends to involve behaviors like "understanding", "perception" and "interpretation". Consequently, it is not easy to arrive at some definite conclusion at the end of the discussion. In this case, it is especially important for both sides, the opponents and the proponents, to give clear and

logic arguments in the process of the discussion. In this respect, the opponent side shows two flaws: one is the confusion of affirmative action with other social welfare programs, the other is the paradoxical argument that a discriminated race can be further degraded by promoting some of its members to higher status.

### **3.3. Chapter Summery**

This chapter focuses on the Supreme Court and the academic circle, reviewing their arguments about affirmative action and their disputes over the problems that arise in the implementation of the policy. The opponents and proponents are highly divided. They even cannot come to terms on such a basic fact as whether racism is still prevalent or no longer dominant.<sup>20</sup> To decide whether affirmative action is a just or unjust practice, they have to first of all make a judgment as to whether they now have a system that is on the whole fair (Bergmann, 16). In order to go beyond the circle of the polemicists and see the context in which the policy is applied, the next chapter will review the history and the current situation that is relevant to affirmative action.

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<sup>20</sup> Fish argues that racism is still so prevalent in this country that special aid is also needed to be given to upper- and middle-class black people, while Eastland concludes that prejudice is no longer dominating, though it has not disappeared yet (Beckwith and Jones, 29; Eastland, 156, 157).

## CHAPTER 4

### IDEAL VERSUS REALITY

Liberty has been a convention of American society, the ultimate goal for many who have come to this country. Yet, in this land of liberty, obedience to the “American Creed” coexisted with discrimination against African Americans, who until today still bear the burden of past sufferings. This contradiction is referred to as an “American dilemma”.<sup>1</sup> Without an understanding of this dilemma, the discussion of affirmative action is not likely to be comprehensive. This chapter will deal with the American dilemma in two sections: American liberal traditions versus institutional and de facto racial discrimination. The contrast of the two parts will illustrate the American dilemma and will also provide a frame of reference to examine the relevance of the arguments given by the polemicists in the above chapter.

#### **4.1 American Liberalism**

##### **4.1.1 The Concept of Liberalism and Its Evolution**

The liberal tradition traces its origin to the beginning of the Enlightenment. One of the most brilliant thinkers of that era was John Locke, the classical liberal philosopher of Britain.<sup>2</sup> Locke maintains that in the state of nature, everyone was equal and independent, and that their entitlement to life, health, liberty or possessions was taken for granted. Without the expectation “to avoid and remedy those inconveniences of the state of nature which necessarily follow from every man's being judge in his own case”, people would not have contracted into civil society (John Locke, 107, 143). Behind Locke's doctrine of classical liberalism lies the idea of the independence of the individual person.

The American historian Louis Hartz defines a liberal in the classical meaning of European origin as one who has faith in individual liberty, equality and capitalism, and

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<sup>1</sup> Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New Brunswick, New Jersey: Transaction publishers, 1996), 67; original edition published in 1944.

<sup>2</sup> Peter Landry, “John Locke Biography”, *Erratic Impact's Philosophy Research Base* (2000), accessed in 2007, [http://erraticimpact.com/~modern/html/modern\\_john\\_locke.htm](http://erraticimpact.com/~modern/html/modern_john_locke.htm).

who is in the conviction that the “human marketplace” is a proper place to test one’s success or failure by one’s own efforts and ability.<sup>3</sup> Classical liberalism of the nineteenth century accepted a largely negative view of freedom, which only refers to a state of unconstraint. And they saw the government that governs the least as the best.<sup>4</sup> For the liberal tradition, a free society is governed by two interrelated principles: No power, but only rights should be absolute; and frontiers should be drawn, but not by men, within which individuals are kept “inviolable”.<sup>5</sup>

Modern liberals also agree that the state should give its citizens the greatest possible freedom when they make decisions on their own “values and ends”. But in the contemporary debate, the moral basis for liberal arguments increasingly wants clarification so as to avoid “moral relativism”. Recent political philosophy falls into two main schools: utilitarian and Kantian. The former advocates “the general welfare”, or “the greatest good for the greatest number”. The latter emphasizes “rights”, claiming that certain rights are so essential that even the general welfare cannot overstep their boundary.<sup>6</sup>

The 1970s and early 1980s saw the prevalence of the rights-based ethic as compared to the utilitarian one, mainly due to the strong influence of John Rawls’ *A Theory of Justice* (Mikael Sandel, 1984, 4). This trend has reinforced the body of theories developed earlier in the civil rights movement during the late 1960s and early 1970s, which justifies preferences to the disadvantaged and minority groups rather than a simplistic version of color-blind policies. What is most striking about this body of theories was that its grounding was not literally in the Constitution or statutes or in “liberal traditions of equal treatment”, but in “history itself” (Graham, 77).

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<sup>3</sup> Tom Wicker, “Introduction to the 1991 Edition”, in *The Liberal Tradition in America* by Louis Hartz (London, UK: Harcourt Brace & Company, 1991), ix.

<sup>4</sup> Bruce J. Schulman, *Lyndon B. Johnson and American Liberalism* (New York: Bedford Books of St. Martin’s Press, 1995), 12.

<sup>5</sup> Isaiah Berlin, “Two Concepts of Liberty”, in Michael J. Sandel ed., *Liberalism and Its Critics* (New York, NY: New York University Press, 1984), 28; originally from *Four Essays on Liberty*, by Sir Isaiah Berlin (Oxford University Press, 1969).

<sup>6</sup> Michael Sandel, “Introduction”, in Michael Sandel ed., *Liberalism and its Critics*, 1-3.

#### 4.1.2. American Liberal Politics

As is the contention of Louis Hartz, the United States from its founding has been a society in which the liberal tradition is “one of the most powerful absolutisms in the world” (Wicker, 1955, ix). And from the New Deal of the 1930s to the Reagan revolution of the 1980s, liberalism was paramount as political philosophy (Schulman, 1995, 1). However, with time elapsed and political situation changing, the content of liberalism underwent considerable change.

The time of Locke was a period of conflicts in British history, when the state power was being transferred from the King to the Parliament. Much of Locke’s work therefore defies authoritarianism.<sup>7</sup> It was natural for Americans to embrace Locke’s doctrine at the founding of the United States, for this was a people “born equal” (Wicker, x). But over time the United States had gradually outgrown the simple mode of its early social stage. “The complexity of modern life and the forces unleashed by the industrial revolution” challenged the negative definition of liberty (Schulman, 12, 11, 178, 185).

A major turning point in American political practice was the era of Franklin D. Roosevelt, which bestowed a legacy on the coming eras.<sup>8</sup> In the 1930s, the Roosevelt government was confronted with the Great Depression. And in the 1960s, Johnson’s era witnessed desperate poverty of African Americans amidst an overwhelming affluence. To such problems, classical liberalism appeared impotent. All in all, the increased diversity in culture, social strata and ideas led to increased complexity in reality, which demanded more sophistication than previously.

Roosevelt’s positive view of freedom traces its origin to the Progressive Era. Roosevelt pushed this view further by combining it with an active government that was strong enough to protect real freedom. To the traditional notion of liberty, the President added freedom from want and freedom from fear, which only “an energetic, vigilant big government” could guarantee (Schulman, 12). From then on, the dominant theme of American politics has been a tradition of New Deal liberalism accentuating “welfare

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<sup>7</sup> William Uzgalis, “John Locke”, in *Stanford Encyclopedia of Philosophy* (2007), accessed in 2007, <http://plato.stanford.edu/entries/locke/>.

<sup>8</sup> Alonzo L. Hamby, *Liberalism and Its Challengers* (Oxford, New York: Oxford University Press, 1992), 3.

statism and government management of the economy” (Hamby, vii). New Deal liberals did not openly deviate from Locke, but their political practice strayed considerably away from classical liberalism.<sup>9</sup> For example, Rooseveltian politics fundamentally discarded “unfettered industrial capitalism” and was considerate of its victims (Hamby, 15). Johnsonian liberalism carried it even further to “liberal universalism”, by which all disadvantaged groups should be compensated for so that everyone can have the same opportunities and share “the same aspirations” (Schulman, 84).

After Roosevelt, for half a century, liberals appealed to government intervention as the solution for the nation’s problems (Schulman, 1). Up to this point, New Deal liberalism, however dilapidated, still maintained its dominance in American life, though increasingly confronted with a popular skepticism (Hamby, 2).

## **4.2. The Status of African Americans**

### **4.2.1. The Plight of African Americans**

The justification of affirmative action is grounded in history. As was insisted by intellectuals during the civil rights era, history imposed the present with deeply rooted injustice (Graham, 77). After the Civil War, the federal government’s victory did not entail racial equality in the South. Even the Populist Movement of the 1880s and 1890s, which emphasized the common class interests among the poor of both races failed to unite the underclass blacks and whites into an alliance.<sup>10</sup> Through the first half of the twentieth century, two separate and unequal societies coexisted in the South.<sup>11</sup> In the field of economics, for example, poverty among blacks persisted into the post-WW II era, when the booming economy of the war and postwar years distributed wealth so generously (Woodward, 2002, 129). In the North blacks were frustrated as society was biased against them (Boyer, 1999, 222). Especially in the postwar era, when the migration of blacks into the big Northern cities increased racial opposition, Northerners began to adopt the “Southern Way” in race relations (Woodward, 115).

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<sup>9</sup> Luis Hartz, *The Liberal Tradition in America* (London, UK: A Harvest Book, Harcourt Brace & Company, Santos AS Diego, 1991), 263.

<sup>10</sup> C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford, New York: Oxford University Press, 2002), 21, 61, 63.

<sup>11</sup> Paul S. Boyer, *Promises to Keep* (Boston, New York: Houghton Mifflin Company, 1999), 222.

The situation was to a great extent ascribed to the attitude of Washington. Few presidents used their power to defy "white supremacy". Congress, which was virtually chaired by Southerners, largely remained silent lest the sovereignty of Southern states be violated. The Supreme Court had initially favored Jim Crow laws and did not ban the system as unconstitutional until persistently pressed by legal challenges.<sup>12</sup>

Education, the focus of this study, is a good indicator of the deprivation imposed upon blacks. Under slavery, education of blacks was illegal (Eastland, 73). After the Civil War, much of the education programs were limited to such aims as making blacks "humble, simple, and of service to the community", as Booker T. Washington proposed. This attitude of submission must have encouraged further aggression among racist whites (Woodward, 95, 82). As a result, blacks were far behind the white majority in education as well as in economic status. In the early 1950s, black high-school graduates entered college at less than half the rate of whites (Boyer, 72). Until 1965, blacks were more than four times as likely to be illiterate (Lemann, 40). Much of higher education had overtly adopted discriminatory admission policies against blacks until Congress passed the Civil Rights Act of 1964. By then, the sociological and psychological ideology underlying the *Brown* decision were not yet generally accepted. That explains why the process of school integration turned out to be far more complex, and its social benefits less evident, than the Supreme Court expected (Boyer, 156).

By the time of civil rights movement, when African Americans finally came to the starting line of the race, as President Johnson put it, they were still hobbled by chains. In the mid-1960s, more blacks attended de facto segregated schools than when institutional segregation was banned by the Supreme Court's ruling in the *Brown* case. Racial slums continued to grow, sprawling over the central cities and sticking young blacks in a trap suffused with an "unimaginable demoralization".<sup>13</sup>

African Americans were an ignored group.<sup>14</sup> The reverse of "segregation" is not

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<sup>12</sup> Tsahai Tafari, "The Rise and Fall of Jim Crow: A National Struggle" (2002), accessed in 2005, <http://www.pbs.org/wnet/jimcrow/struggle.html>.

<sup>13</sup> Bayard Rustin, "From Protest to Politics", in William H. Chafe ed., *A History of Our Time* (Oxford, New York: Oxford University Press, 2003), 153; originally published in *Commentary* (February 1965).

<sup>14</sup> Peter Schrag, "The Forgotten African", in Bruce J. Schulman ed., *Lyndon B. Johnson and*

necessarily “integration”, nor “equality”. Without segregation, it does not necessarily mean that other types of injustice or caste social structure are wiped out (Woodward, xi). For decades, the Northern whites were unmindful of the terror that the Southern racialists imposed upon blacks. While black rage accumulated and demand for change intensified, most whites were not yet alert (Boyer, 226, 72). This explains the paradox that the victory in the civil rights movement overlapped with more violent protests. The new surge of protests was directed at something else. The irrationality and violence in the demonstrations indicated that blacks’ demand for desegregation were not genuinely satisfied. A “Second Reconstruction”, as Woodward puts it, was needed to accomplish the cause for African-American liberty and equality (Woodward, vii-viii, xi).

In fact, what was supposed to be born with pains from the Second Reconstruction constituted “nothing less than a new society” (Boyer, 223). The Second Reconstruction aimed at all the aspects of racial relations, not only the aspects that the First Reconstruction attacked, but also those avoided or neglected (Woodward, 9). It can be imagined that the accomplishment of such a full-scale, many-sided project was bound to be full of hardship.

There is evidence that the hobbled condition of African Americans persisted till quite recently. To illustrate with a test made at the end of the 1990s, the job market provided evidence of discrimination: White young men had 45 percent more chances to get employed than black young men. Since it is one’s job that primarily decides one’s social status in the United States, the low status in the job market would lead to a lack of respect (Bergmann, 16, 51).

Until the beginning of the 21<sup>st</sup> century, it was apparent that blacks still tended to be trapped in poverty and lack opportunity because of their race (Moen, 256). In addition to the plights that traditionally frustrated blacks, Cornel West has identified “nihilism” as the gravest threat to underclass African Americans. Until the early seventies, the suicide rate among blacks was the lowest of ethnic groups in the United States, but by 1993, black youth headed the list in suicides. Cornel West warns that nihilism,

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*American Liberalism*, 235; originally from *Harper’s* (August 1969) pp. 27-34.



nourished by poverty, is more vicious than poverty itself: It devours young lives (West, 122). It thus can be concluded that on many accounts race is still a substantial and decisive factor for “a wide variety of attributes, attitudes and outcomes”. No one can claim that race no longer matters (Moen, 256, 236).

#### **4.2.2. The Cause of the Plight**

There are various perspectives explaining how African Americans became hobbled. Bayard Rustin emphasizes the legacy of history as decisive to the later socioeconomic status of blacks. He compares blacks with Jews, another racial group that suffered discrimination in history, and points out that in at least three aspects African Americans are more disadvantaged: 1) For the most part of African American history, they were legally deprived of the opportunity of education; 2) Black family structure was fundamentally ruined by slavery so that young African Americans rarely had a culture heritage from their ancestors; 3) African Americans played a disadvantaged role in the economy. As predicted by Rustin in 1965, the third aspect has posed the most serious problem: The technological revolution has changed the nature of the labor force, destroying unskilled and semiskilled jobs, where African Americans mostly locate. It has hence eliminated the possibility for African Americans to make a start from the bottom of the society (Rustin, 1965, 154).

William Julius Wilson agrees with Rustin, claiming that it is the structural change in the American economy that makes the urban poor particularly vulnerable. Having been chained for a long time by racial and class suppression, the black underclass possesses resources that are disproportionate as compared with those of white people. In addition, they face intensified competition in the market (Wilson, 156).

Graham also agrees that, lacking in resources, African Americans stand little chance in coping with the economic transformation “from manufacturing to service-based employment”: As the U.S. economy regained strength after its recession in the early 1990s, entrepreneurs recruited more skilled and educated workers to staff the economy’s rapidly expanding high-technology sector. As the higher education sector of the United States had vacant seats left behind by the “baby bust” of the 1970s,

universities turned abroad for new students and faculty in science and engineering to draw “top international brain-power” (Graham, 26, 161).

There is another explanation that looks at the aspect of culture. During the mid-1960s, the concept of “culture of poverty” gradually came into being. This concept refers to a way of life that permeates the hard-core slum community and reproduces from generation to generation, with such features as “unstable families, high rates of illegitimacy, low levels of voting and political participation, poor self-esteem, and traumatic childhood experiences” (Schulman, 97). Nihilism can be identified as part of the culture of poverty. Cornel West believes that, because the saturation of market forces and market moralities have corrupted black life, the nihilistic threat is more disastrous than ever. Nihilism does harm by a “self-fulfilling prophecy that without hope there can be no future, that without meaning there can be no struggle”. This vicious circle batters cultural institutions and intensifies nihilism as the traditional defense against it becomes dilapidated. But once getting down to fundamentals, West assumes that structures and behavior are inextricable. And culture, rather than a transient set of behavioral attitudes and values, is as much a structure as economics or politics. Since nihilism feeds on poverty, it follows that government reduction in subsidy for the poor is one of the factors that have fueled the prevalence of nihilism (West, 122, 124, 125). Thus, to trace the root cause of nihilism, West pins down the socioeconomic structure.

It thus can be concluded that the hindrances that trap African Americans are generated from a problematic social system. In other words, on the one hand, African Americans have been chained down by their history; on the other hand, because of the economic transformation, the social institutions have already missed the optimal time to give them due compensation, which would have helped them out of the plight. As a result, while the world is changing rapidly, African Americans can barely progress synchronously with other ethnic groups.

#### **4.3. Chapter Summery**

It is true that liberalism has been the dominating theme of the United States, but for centuries it coexisted with slavery, the subsequent Jim Crow laws and de facto racial

discrimination. This has definitely evidenced that liberty has been the privilege of the white bloc, from which blacks have been excluded. Worse still, African Americans have suffered from the deficiency and imperfection of classical liberalism, such as slavery adopted in the southern states and disparities between classes generated by unfettered industrial capitalism. Traditional liberalism was apparently impotent to dispel this inequality between the races. It was this impotency of classical liberalism that inspired the modern liberals to adopt interventionist policies.

As a consequence of suppression and deprivation, many African Americans lack the ability and motivation to compete in the free market system. Living for a long time in a state of institutional and de facto segregation, many black youths tend to be influenced by factors that come from their own insulated world. Therefore, presumably an African American can be motivated, directly or indirectly, by the elevation of other members of his or her own community. This group-based consideration, however, is literally at odds with the Constitution. But is it fair to merely interpret the Constitution literally while leaving the disadvantaged excluded from the benefits of the American Creed? The next chapter will make an analysis in light of several theories to provide justification of affirmative action.

## CHAPTER 5

### POLICY ANALYSIS

To evaluate affirmative action, Barbara R. Bergmann suggests two issues for consideration: whether compensation is justified and whether affirmative action is a good form of compensation (Bergmman, 125). Enlightened by Bergmann's suggestion, this chapter of policy analysis will mainly cover two aspects: The first aspect concerns the value of the policy, analyzing whether the policy is just or not. When the policy's value has been established, the analysis will go on to the second aspect: the policy's feasibility and the difficulties in its implementation. The evaluation of affirmative action will mainly employ four theories as the framework: John Rawls' theory of justice, Ase Gornizka's policy analysis theory, Douglas Rae's equality theory and theories of higher education by several other authors. With Rawls' theory of justice the analysis is from the perspective of morality, while with the other theories social practice is the major concern.

Although affirmative action deals with problems of inequality in several areas and has extended its benefits to several disadvantaged groups, this analysis, in order to make the study manageable and focused, will only deal with problems in higher education and only target African Americans, for whom the policy was originally instituted.

#### **5.1. Evaluation in Light of Rawls' Theory of Justice**

Rawls' theory of justice is used as a framework for analysis for two reasons. For one thing, affirmative action and Rawls's theory are inherently associated: The civil rights movement not only precipitated the situation that demanded affirmative action, but also conceived the ideology that gave birth to Rawls' theory of justice. For another, the reasoning of Rawls' theory is based on the "veil of ignorance" (Rawls, 11). It thus can be assumed that this theory has transcended all interest groups and is relatively nearer to fairness, so that it may play the role of a neutral arbiter.

According to John Locke, contract society exists to a great extent because social members think that this institution, as compared with the statue of nature, can more

efficiently guarantee their peace and security (Locke, 164). It is the need for cooperation that entails commonly accepted criteria with which to evaluate social systems. This is the precondition for Rawls' theory of justice.

Only a just society can provide a system acceptable to all parties of different or even conflicting interests, integrating the parties into a society which has the capacity to redress and to restore equity. Otherwise, laws and institutions, as long as they are unjust, must be reformed or abolished even if they are efficient and well organized (Rawls, 3). Affirmative action is a policy intended to reform an old system that is unjust to African Americans even if it is efficient and well organized.

Justice as fairness proposed by Rawls mainly includes two parts: One part is condensed into the principle of liberty, the other part into the principle of difference and the principle of fair equality of opportunity. For the most part each person holds two relevant positions: One is his position of equal citizenship, while the other is defined by his location in the resource distribution pattern. The first part of Rawls' justice as fairness covers the political rights of the citizens, while the second part covers social and economic interests (Ibid, 53, 82, 13). In other words, the principle of liberty governs the political rights, while the principle of difference and principle of fair equality of opportunity govern social and economic interests. Affirmative action, which mainly embodies the principle of difference, also upholds the other two principles. Therefore, the following analysis of affirmative action involves the area of political rights and the area of social and economic benefits.

#### **5.1.1. Affirmative Action as Guarantee of Political Rights**

It was through centuries of struggle and not until the birth of the Civil Rights Act of 1964 and the demise of racial segregation that African Americans in all parts of the country finally could vote, work and study together with whites and thus won back the political rights that the Constitution has always promised. Rawls points out that the first principle of justice should have priority over the other two principles (Rawls, 53). Accordingly, all citizens should have equal liberty with respect to legal and political rights. African Americans' long struggle for political rights, therefore, was the task that

must first of all be fulfilled.

But in fact, in many cases the rights remained at a theoretical level rather than in effect. As the above review of history has revealed, when institutional racial segregation was put to an end and African Americans gradually gained the political rights equivalent to those granted to whites, American society did not become quiet. On the contrary, the social contradiction seemed to be even more sharpened, conceiving even more severe conflicts (Schulman, 111). Martin Luther King started his struggle for the political equality of African Americans and later began to include economic equality in his struggle. This change reveals his gradual realization that abstract, virtually empty political rights are of little significance without social and economic rights. In his book *Why We Can't Wait* (1963), King explained that even if discrimination were ended at once, blacks could not have the granted rights as long as they continued to be stuck in poverty. King attached such great importance to social and economic equality that he proposed a Bill of Rights for the Disadvantaged.<sup>1</sup>

As such, only in a society where social and economic rights, as well as political rights, are guaranteed to everyone, is it possible for the citizens to enjoy the freedom from want and freedom from fear. Affirmative action starts with the economy and education, but its ultimate goal is to radically elevate African Americans in political status. That is, affirmative action is an important step to improve and put into effect the political rights of African Americans and other underprivileged groups.

### **5.1.2. Affirmative Action as an Approach to Equality of Opportunity**

In his principle of fair equality of opportunity, Rawls insists that offices and positions be open to all under conditions of fair equality of opportunity (Rawls, 63). It should be noted that “fair equality of opportunity” is the precondition for “positions open to all”. That is, since candidates have different starting places and consequently are different in

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<sup>1</sup> Martin Luther King, *Why Can't We Wait* (New York: New American Library, 1963), 129, accessed in January, 2008, [http://books.google.com/books?id=IDUgwcqfupQC&printsec=titlepage&vq=bill+of+right&lr=&hl=zh-CN&ie=GB2312&output=html&source=gbs\\_toc\\_s&cad=1](http://books.google.com/books?id=IDUgwcqfupQC&printsec=titlepage&vq=bill+of+right&lr=&hl=zh-CN&ie=GB2312&output=html&source=gbs_toc_s&cad=1).

competitive power, efforts have to be made first of all to equalize opportunity. Otherwise open positions are of little significance to those with disadvantaged starting places. As is interpreted by Rae, Rawls rejects equality in just a formal sense. Rather, his emphasis on the conditions of fair equality of opportunity in fact suggests equal prospects to all talents (Rae, 72).

Concerning the reality in the United States, it is true that African Americans are legally entitled to employment and education positions. But it remains an open question whether they have equal opportunity to actually get the positions. In fact, there exists a great imbalance in employment and education between African Americans and whites, which is disproportionate to the racial distribution in the population. Affirmative action, in effect, is an intervention to break this imbalance and to impose the condition of fair equality of opportunity before all talents start to compete for the positions.

If institutional discrimination is “hard”, then discrimination in thoughts and the subconscious is “soft”. The latter may hide under plausible regulations. Old conventions and thoughts do not vanish at once with the elimination of discriminatory institutions. In recruitment systems, regulations left over from old times contain much subjectivity. Some policies were designed from the perspective of whites. Affirmative action serves as a forceful intervention to eliminate “soft” discrimination.

Presumably, for a considerable period of time, both blacks and whites had only partial, vague knowledge about social justice and racial problems. Those whites who had long betrayed social justice, of course, had little possibility to be fair-and-square in this matter. Even President Johnson failed to foresee the complexity and toughness of racial problems (Schulman, 112). On the part of African Americans, it was through considerable effort and with the evolution of the situation that they gradually deepened their understanding of their own situation and mission. The demand for equal opportunity in employment and education is their strike for real, not formal, equality. Affirmative action not only rectifies some of the bias in whites, but also urges blacks to strive upward: Opportunity is extended only to those who go all out in their work.

According to Rawls, the fact that the advantaged and disadvantaged occupy different positions in society is to a great extent arbitrary (Rawls, 63). The advantaged

and the disadvantaged get drastically different treatment from their birth. This is why a just society should compensate for the disadvantaged so that they are able to compete from an equal starting place for positions made available to them. To illustrate, the door that is closed because of bias and discrimination is made of glass. It is transparent but inaccessible. Affirmative action breaks the door and lets in those who aspire for opportunities but would otherwise be denied the opportunities. Opponents of affirmative action are afraid that such favors may lead to an “entitlement mentality” and hence crush people’s enterprise (Shelby Steele, 25; Moen, 208). However, in contrast to other forms of preferential treatment, affirmative action may be the last to produce a mentality of dependency, because one has to be self-reliant in the first place before he or she can be considered as a beneficiary.

### **5.1.3. Affirmative Action and the Principle of Difference**

#### **a. Affirmative Action and the Principle of Redress**

One only has to look at the racial differences in American society to readily appreciate the notion of redress. Compared with their white counterparts, African American youths tend to be brought up in relatively less academically encouraging atmosphere or even in an adverse environment. Even many located in the middle class cannot be exempted (Kahlenberg, as quoted in Moen, 230). It takes an African American more effort than a white to enter a school of identical reputation. Now that there exists salient inequality, there is hardly equal opportunity, and equal treatment will only lead to unequal results, as is pointed out by Rae (Rae, 74). Affirmative action applied in higher education intends to redress this injustice with justice. But this approach of redress is not by way of imposing a uniform result upon everyone, especially after the quota admission policy was banned. Instead, its beneficiaries are limited to those whose excellence has been hindered by racial discrimination, or who are the most talented among the least advantaged. They are singled out for the favor because such an arrangement will ultimately promote their disadvantaged racial group. A prevalent criticism of affirmative action is that it tends to benefit students from middle-class families. But affirmative action is not based on the redress principle but on the difference principle: Greater gains



for those situated in the middle class is justified if this arrangement in the long run increases the gains of the underclass African Americans. Thus, affirmative action more or less regards the distribution of natural talents as “common asset” to be shared in the greater social and economic benefits made available by the complementarities of this distribution (Rawls, 87).

It is true that the focus of affirmative action is not on process but on result, but this formal inequality is limited to just a certain period in one’s life. This difference in treatment in effect embraces equality in civil rights. Consequently, affirmative action not only agrees with the principle of difference, but also contributes to the accomplishment of the principle of liberty.

#### **b. Affirmative Action and the Conception of Reciprocity**

Rawls’ principle of justice requires that economic and social inequalities benefit everyone, especially the least advantaged (Rawls, 65). While Rawls interprets the reciprocal relationship between the advantaged and the disadvantaged from a moralistic perspective, American history as a matter of fact evidenced that lack of cooperation between whites and blacks was harmful to both races. Since as early as colonial times, American society was institutionally separated into two worlds: One was a free society throbbing with vitality, while the other was a lifeless society of slavery. In the wake of the Civil War and the termination of slavery, there came institutional segregation between the two worlds: one was an open society thriving with talents and competition, while the other was a closed society of obscurity. In fact, segregation in the South increased after the Civil War, which ultimately manifested as the Jim Crow law (Woodward, 41). Even the institutional abolishment of racial segregation could hardly dispel de facto segregation. The inequality between the two separate worlds had so greatly handicapped American society that the Civil Rights Act of 1964, instead of bringing harmony to society, discharged the wrath that had long been choked down and led to conflicts and riots. The victims included whites as well as blacks (Schulman, 112). The racial conflicts were demonstrations that African Americans could no longer tolerate a distributive scheme that deprived them in history and would allow whites to

continue their monopoly over social benefits. Even until quite lately, after decades of endeavor to improve the situation of African Americans, the lack of faith in the fairness of the system is still much more prevalent among blacks than among whites (Lemann, 52). In this case, compensation to African Americans for what they have previously been denied by racial discrimination may be an attempt to attract them back into willing cooperation with the mainstream society.

### **c. Affirmative Action and the Principle of Fraternity**

Rawls in fact takes fraternity as an important social resource (Rawls, 90-92). When a society is clearly stratified into advantaged groups and disadvantaged groups, more attention to the less fortunate is an index of social progress. To the disadvantaged, more harm comes from “the poverty of conscience” of the majority, as King puts it, or from the lack of justice intervention of the society, than from the vices by individuals (King, 1963, 103). In a society where people stick to individualism, government intervention, as an approach to counteract collective indifference, is indispensable for the integration of the society. In one way, affirmative action is an intervention into people’s life out of fraternity, so to speak.

The fraternal tie between the advantaged whites and disadvantaged blacks justifies extra help to some African Americans. It is true that the natural meaning of fraternity is not the identical of the democratic rights, but without it, these rights will decrease in value, and a modern, democratic society will tend to be one that retains only the organization and quantity but drains away humanity. It is from the perspective of fraternity that it can be most convincingly concluded that affirmative action programs that give some African Americans preferential treatment mean respect rather than stigma to its beneficiaries.

#### **5.1.4. Justice Ideal and Practice**

A fair and reasonable policy alone cannot guarantee that the policy is implemented in a fair and reasonable way. The judgment of a policy, therefore, has to include the evaluation of policy implementation as well as the policy per se. A fair implementation

of affirmative action still demands great efforts in handling the irremediable complex reality. That the simplistic approach of quota came into being very well indicates that much remains to be done to perfect the implementation strategies. But once a just policy exhibits many moral advantages, it is worthwhile to make efforts to have it perfected.

Both the justice and the complexity of affirmative action largely concentrate on the problem of compensation. Owing to the injustice in history, compensation is doubtless just. But the fair application of the policy to reality is a matter of great complexity. To make it specific, in the process of compensation, there exists a critical point that nears equity. Once beyond this point of balance, the compensation will deviate from justice. But to identify this point, or to decide upon the stage where black and whites are perfectly equal, is of great difficulty.

The diversity argument in fact is an example of withdrawing from this difficulty. As the basis of affirmative action, the diversity argument has been criticized for its ambiguity. It is true that, theoretically, it is contradictory to its original intention to redress historical injustice. Yet, given the complexity of the reality at that time, there did not seem to be other, more feasible alternatives. Although the orientation of the policy was allegedly shifted from the past to the future, it managed to retain the fundamentals of the policy: African Americans would continue to receive preferential treatment as one of the beneficiary groups and thus the policy was not completely disengaged from history. What is more, it managed to conciliate the disputing parties: On the one hand, it disapproved the simplistic interpretation of the equality-to-all doctrine regardless of history; on the other hand, it rejected the simplistic approach of quotas. This is an example of prudence, which avoids deciding upon a point of equity, or shuns a simple moral judgment.

Although Rawls' theory of justice occupies a commanding elevation in morality, it has to be rooted in the soil of reality in order to become socially significant. Affirmative action may serve as the instrument that converts the theory of justice into a practice of justice. However, this process of conversion involves considerable complexity. Rawls' theory of justice is, after all, a contract agreed upon by people from a fair, original position, or a contract of an idealistic society. In reality, we are not provided with an

original position, nor is our society an ideal world. Affirmative action, though supported by Rawls' theory, is much more likely to meet resistance than the theory per se. This practical program has to deal with different interest groups. Moreover, it gets entangled in the very sensitive problem of race and consequently can hardly be exempted from criticisms and questioning.

## **5.2. Evaluation in Light of Gornitzka's Theory of Policy Analysis**

This section examines the policy elements of affirmative action with the intention to establish the factors that have led to the rise and decline of the policy. With the assumption that affirmative action is in accordance with social justice, this analysis is mainly from the position of policy-makers.

There is an analogy between the implementation of a government policy, which is affected by various external factors, and the navigation of a ship, which is under the sway of winds coming from different directions. It is especially so in democratic countries, where the government is not supposed to push a policy against public opinion. Since affirmative action was contested and disputed, the Supreme Court intervened with its *Bakke* case ruling, which shifted the goal of the policy from compensating for past wrongs to achieving diversity. In effect, the *Bakke* case divided the implementation of affirmative action into two phases aiming at two different policy problems.

### **5.2.1. Policy Problem**

The case of affirmative action illustrates how policies can be relatively stable, while policy problems may vary with external changes. In the first phase, the policy targeted the problem of racial discrimination, which can be seen from the historical background of affirmative action. To the policy-makers, the policy problem was the social disturbance caused by large-scale protests and riots against racial discrimination.

But this was only what emerged on the surface. A great part of the underlying problems was caused by the fact that African Americans' lacked competence in the market (Bayard Rustin, 1965, 154). Large numbers of African Americans, who were in their youth or in the prime of life, had low school qualifications or obscure employment

prospects. To a group as such, routine relief oriented to the needy and distressed was obviously not appropriate. This group of African Americans longed for better education, a promising future, a decent job and the acceptance of society. They were the ones who possessed the resources required for social organization and mobilization and hence were the major organizers and participants of black social activities. When these people were desperate about their hopeless prospects and poured out their discontentment and rage, it meant a great threat to social safety.

Presumably, the policy-makers were concerned about how to eliminate the underlying factors of the disturbance so as to sustain social order. Eventually, the focus was on those young and middle-aged people who had aspirations of social mobility. From the perspective of policy analysis, the policy problem could be specified thus: The existing government policy system hindered the upgrading of African Americans, leading to their discontentment and consequently social turmoil. In conclusion, the existing government policy system wanted improvement. From the position of the policy-makers, the choice of policy problem was based on two considerations: both justice and efficiency, or both political pressure and social tolerance.

In the second phase, by the *Bakke* case in 1978, affirmative action had already been implemented for about a decade. In the meantime, a considerable middle class emerged from African Americans. But it needs to be pointed out that many African Americans were still new to their middle-class status (Kahlenberg, as quoted in Moen, 230). Their status needed continued sustenance from favorable government policies. However, as the problem of racial discrimination was no longer as protrusive as it used to be, criticisms of “reverse discrimination” arose. As a result, the continued implementation of policies that favored African Americans as a group met with considerable resistance. The opposed arguments in the Supreme Court and the narrow victory of the policy’s proponents in fact reflected the disputes in the society at large.

Apparently, the ruling by the Supreme Court gave new push to the continued implementation of affirmative action. But in effect, the policy problem became less focused, or diluted. The black problem, which obviously reflected an abnormal society, gave way to a problem of normal society, the racial diversity problem. In other words,

discrimination against blacks results from a unique history, while the absence of diversity is a problem that any multi-racial society has to be alerted to. In this sense, the ruling in the *Bakke* case in effect transferred the policy problem from a historical problem into one component of a general, contemporary problem. To make it more complex, a great immigrant influx extended the problem beyond a manageable scope and thus seriously reduced concerns for blacks. This hidden trouble for the policy was later manifested in the passage of the California Civil Rights Initiative in the year 1996.

From the position of African Americans, the policy problem being transferred from racial discrimination to absence of diversity seems to have come too early. It turned the focus away from the black problem before it was fundamentally relieved. Theoretically, change in the policy problem is justified and does not mean inconsistency or levity. But this change demands preparation in external conditions. Admittedly, the switch from the discrimination problem to the diversity problem as related above was a very clever political strategy with which to negotiate between conflicting parties. But to remedy social problems, it occurred at a time when many African Americans were obviously lagged behind in many areas and when the impact of the market reduced them to greater vulnerability. Thus, this shift posed difficulty to bureaucrats in implementing the policy and achieving the policy objective.

### **5.2.2. Policy Objective**

Once a policy problem is established, the policy objective is its reversed reflection. The difficulty of a policy problem to a great extent shapes the coverage and duration of the policy objective, because the achievement of an objective demands time and resources that are corresponding to the policy problem. The objective of affirmative action was, with some preference measures, to elevate the educational and economic status of those African Americans who had potentials and aspirations but who had been hindered by racial discrimination. Therefore, it did not cover the whole group of African Americans, although it contributed to the general cause of eliminating racial discrimination.

The limited scale of the policy objective entailed much less cost. This was a practical approach. After all, the price that American society could afford to pay

depended on the pressure from the problem and also on the tolerant capacity of the society. In deciding upon an objective as such, the policy makers must have been seeking a balance between social justice and economic interests. In other words, the decision was based on political pressure and social tolerance. In this case, it was not realistic to presume that affirmative action, which was only part of a bigger scheme, should be the once-and-for-all solution to the big problem. The limited capacity of the policy is one of the major dissatisfactory aspects that incur criticisms (Eastland, 155; Schuck, 2002, 126; Steele, 10, 76; Wilson, 153). Yet, rarely do these critics allude to the fact that it was because affirmative action could control the government expenditure on a moderate scale that it was more preferable than other more general alternative programs. Nor do they regard the effectiveness of affirmative action as compared to other training programs for the disadvantaged (Moen, 204; Nicholas Lemann, 51; Beckwith and Jones, 32; Bergmann, 177).

Admittedly, affirmative action has a symbolic function. Although often referred to nonspecifically as the measures to eliminate discrimination against disadvantaged groups, the subjects of the policy include only those who are considerably prepared and endeavor to change their status. In the area of higher education, the beneficiaries of the policy are those relatively well prepared in basic education, who tend to be located in the middle class rather than trapped in desperate poverty. But symbolic roles should not be underestimated. After all, as discussed earlier, history has created such a group; that is, a group identity has been imposed upon African Americans as a whole (Paul W. Taylor, 14). So far, they are still the most segregated ethnic group residing in a substantially separate world (Nicholas Lemann, 52). As an identifiable group, they share much of the same culture. A model within their own group will presumably function much more significantly than models from other groups separated from them. A “vicarious association” may apply in this case: Favors to certain members of the victim group may be potent to some less tangible harms such as loss of motivation and self-respect, and may in the long run bring back motivation and self-respect to the whole group (Moen, 223). To the underclass blacks, the loss of hope, or the spread of nihilism, may be lethal. Affirmative action is not an immediate remedy for nihilism. But

the policy has contributed to a sharp increase in the number of black elites (Wilson, 158). This consequently holds promise for those who otherwise would give up. In this way, the policy may contribute to overcoming nihilism among underclass blacks.

But this measure is not the same as compensation in a monetary form, which favors some individuals while the whole society pays for the price. By affirmative action, the burden of compensation falls upon specific white individuals. From a historical perspective, the burden left over by previous generations fall upon the present generation. From a present perspective, the obligation of the whole society falls upon certain individuals. This to some extent undermines the morality of affirmative action, which is also where affirmative action meets most resistance in its implementation.

As is pointed out, affirmative action is not the most important issue for black progress, but it is a part in the redistributive chain that cannot be overlooked if the problem is to be solved (Cornel West, 131). In other words, achievement of equality is a monumental project, while affirmative action constitutes only part of it. The larger project, being far-ranging and in-depth, is bound to come across myriads of difficulties. Affirmative action, aiming only at a certain aspect of the problems, has reduced the extent of difficulty, but necessarily has limited capacity. It is not fair to expect the policy to be omnipotent in the interest collision of different parties. And it should be expected that the elimination of affirmative action would greatly flaw the big project.

### **5.2.3. Policy Normative Basis**

A policy normative basis provides the moral and ideological foundations, which in turn are heavily dominated by contemporary values and beliefs (Gornitzka, 19). The change in policy problems and policy objectives of affirmative action was influenced by multiple factors. One of these factors was grounded in the fact that the policy's normative basis was undermined. To a considerable extent, the alternate ebb and flow of liberalism and conservatism in American society alternately reinforced and eroded the normative basis of affirmative action.

At its first stage, affirmative action came into being when a new wave of liberalism was dominating the United States. Traditionally, individualism and liberalism have been



the leading beliefs that advocate individual struggles, protection of individual rights and being alerted to government interference. But in 1941, President Roosevelt included in the four basic freedoms not only traditional liberties, but also freedom from want and freedom from fear (Schulman, 12). For the first time, the element of “economic justice” was included into the scope of basic human rights. Ever since, starvation is no longer regarded as private affairs but as deprivation of basic rights, which the government and the whole society are obliged to eliminate. Based on this assumption, interventionist policies intended to protect disadvantaged groups are not only justified, but also imposed upon the advantaged groups as a duty. By this stage, the content of liberalism had undergone considerable evolution. It was no longer limited to traditional laissez-faire, and the 1950s and 1960s witnessed the climax of New Deal liberalism.

When American society was turbulent with black riots as well as other problems such as black poverty in an affluent society, liberalism was in its prime in American politics. This mainstream value was one of the factors that influenced the policy-makers of the Democrats and the Republicans alike. This made preparation for affirmative action. In fact, affirmative action was established by President Johnson, a Democrat, but actually pushed to a broad implementation in some fields by President Nixon, a Republican (Graham, 9).

But liberals of the 1960s and the 1970s had some problems that they could hardly conjure away. They had an inherently dualistic principle: In the first sense, individuals and enterprises have the right to reject government intervention as much as possible, which is the heritage from classical liberalism. In the second sense, the government is obliged to guarantee to the citizens the equality in freedom, opportunity, income and wealth and is justified to adopt interventionist policies when necessary. This dualism leads to conflicts. It is much easier to argue for liberalism as an ideal. Once embodied in a specific policy, the government frequently gets involved in the complexity of negotiating and making choices between different interest groups. Balancing between different or even conflicting parties, liberals emphasize interventionism, which necessarily aggravates those who stick to laissez-faire.

Affirmative action means unambiguous measures of interventionism, which in turn

increase the burden of taxpayers and transfer work and education opportunity from whites to nonwhites. This approach impinges the individual rights of whites as granted by classical liberalism. More important, this liberal policy also impacts upon the value that the mainstream of the society traditionally holds: diligence, independence, family stability and social order. It thus helped boost the rise of conservatism.

At the second stage, the main driving force behind the Second Reconstruction of the 1960s was on the wane. After the mid-1970s, advocates for affirmative action witnessed their recession (Moen, 256, 253). There were multiple factors that led to this shift in ideology. One of the factors that shook the foundation of affirmative action was grounded in the dissatisfactory aspects of liberal politics. Reagan conservatism, which by then had found room to develop, is a return to classical liberalism. It adheres to the faith that one should be responsible for oneself, and that an interventionist big government will only sweep away social differences to protect the lazy ones and impose high taxes to rob the middle class.<sup>2</sup> This plebeian conservatism does not necessarily identify with the existing system, but believes that an individual's effort can change one's life and the society into which one is born.

Because of the difference in values and beliefs, Democrats and the Republicans have different policies to remedy the same social disease or to negotiate with different strategies between the interest groups. In practice, they adopt different schemes to approach such social problems as the plights of the disadvantaged. Conservatives are negative toward government intervention. They doubt that government has the ability to solve the many social problems that liberals have targeted. Especially when liberal policies were carried beyond the tolerance of many whites, Republicans condemned government intervention as the culprit responsible for moral deterioration and urged a return to the traditional values (Xue Yong, 2004).

It thus can be seen that different responses to affirmative action are often based on people's different cognition and perception of the policy rather than decided by the

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<sup>2</sup> Xue Yong, "The Birth of a Conservative Country", originally publicized in August of 2004, accessed in January, 2008, <http://robertfang.blogbus.com/logs/313527.html>.

content of the policy. This difference is closely related to changes in the contemporary values and beliefs, which are no more than variables. It could therefore be assumed that previous acceptance of affirmative action and the later blame upon it to a considerable extent resulted from the changes in American mainstream values.

#### **5.2.4. Policy Instruments**

The ebb and flow of a policy owe much to the resources that the government has devoted to policy implementation. Since affirmative action is the outcome of interventionist politics, only an interventionist government can afford to muster the policy instruments needed for the actualization of the policy objective. A laissez-faire politics means decreased effort in the use of policy instruments, which will unavoidably hollow out the policy.

President Johnson had long been instrumental and embraced “*Realpolitik*” in his career (Moen, 26). He realized that previous government policies lacked dynamics and that the concerned institutions, like the Fair Employment Practice Committee, were mostly temporary. These temporary institutions had limited intervention power to implement anti-discriminatory measures and hence tended to be merely symbolic. Considerable efforts were devoted to policy instruments during the Johnson and Nixon eras to sustain affirmative action.

We only have to look at the policy instruments used by the Johnson and Nixon administrations to understand why affirmative action was on the rise during these two presidents’ tenure of office. Governments sending out information makes propaganda preparation, winning larger constituency for the policy. As one example, President Johnson’s speech at Howard University provided moral justification for his E.O. 11246, which in turn created the OFCC (Office of Federal Contract Compliance). As another example, the EEOC (Committee on Equal Employment Opportunity) funded a study that revealed to the public the inefficiency of the color-blind approach (Moen, 30, 29).

Government issues of binding laws establishes framework for policy implementation and empowers the executive agencies to supervise the implementation procedures. The Johnson administration was outstandingly effective in introducing new

legislation. It was the Civil Rights Act of 1964 that created the EEOC, and it was President Johnson's E.O.11246 that created the OFCC. Public bureaucratic agencies are the executives of the policy with which the Johnson and Nixon administrations transformed the "color-blind" affirmative action into "color-conscious" programs. The EEOC and the OFCC made great efforts to get "results". For example, EEOC sent racial reporting forms to all employers within the agency's jurisdiction. If government contractors failed to recruit the required proportion of African Americans, the OFCC could cancel their contracts (Savage, 294; Moen, 26, 27, 28, 30, 25). The above facts show that these bureaucratic organizations coerced enterprises into acceptance of affirmative action.

Funds are decisive for any government policy. The birth of affirmative action itself is a vivid illustration. President Johnson's anti-poverty war turned out to be much less than what he had expected, to a great extent because it coincided with a deepening U.S. involvement in the Vietnam War. The military war effort severely drained the sources away from the economic war. Searching for the cheapest alternative, policy-makers decided on the color-conscious affirmative action remedy (Moen, 28). As another illustration, the government's pattern of fund distribution greatly attracted organizations into voluntarily cooperation with affirmative action programs. In the area of higher education, the federal government provided subsidies to schools that carried out affirmative action.<sup>3</sup> Within the limited scope of the policy objective, both Presidents Johnson and Nixon allocated considerable resources to make the policy effective. When the Reagan administration severely cut public funds, higher education institutions were forced to depend less on government support, and some conservative universities began to deviate from the color-conscious theme (Liu Baocun, 2002).

As such, it can be seen that only interventionist presidents like Presidents Johnson and Nixon can uphold such an interventionist policy as affirmative action, to which policy instruments are vital. The program was bound to decline when Reagan conservatism began to dominate the political arena, because laissez-faire politics would

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<sup>3</sup> Liu Baocun, "Affirmative Action of the United States", in *Transactions of Xinjiang University* 4 (2002), accessed in January, 2008; <http://www.ilib.cn/A-xjdxxb-sk200204013.html>.

mean a general withdrawal of most kinds of policy instruments and would in turn mean much less possibility to substantialize affirmative action.

#### **5.2.5. Policy Linkage**

Many American presidents since Franklin D. Roosevelt have issued orders to fight against racial discrimination. Even the use of race-conscious measures could be traced back thirty years before President Johnson's War on Poverty (Moen, 23). The Civil Rights Act of 1964, together with President John F. Kennedy's executive order, set the stage for affirmative action and later provided the most important support for this policy. It was the climax of the anti-discrimination legislation. Affirmative action was the extension and particularization of the Civil Rights Act of 1964. In this sense, affirmative action was in accordance with the previous policies, which was one of the reasons that President Johnson could successfully embark on the policy at the very beginning.

But in the meantime, affirmative action as a new institution was bound to challenge many old policies and norms that were totally different or even oppositional. Traditionally, recruitment of African Americans to an institution was not based on coercion by the governments. The governments respected the formal equal criteria adopted by enterprises and schools. Deviating from tradition, Johnson's affirmative action was no longer limited to the principle of formal equality, but expanded to preference. The Johnson innovation was intended to counteract racial discrimination, an evil that could be hidden under the formally equal standards. Of course, government coercion was limited so as to reduce the tension between affirmative action and other policies. Nevertheless, affirmative action as an institutional novelty was trapped in the old system and would necessarily meet with resistance.

In contrast to other policies aimed at the disadvantaged, affirmative action targets those who, in spite of their disadvantaged status, have better prospects in social competition and consequently are likely to rise up in the world once they are given a lift. In other words, affirmative action benefits the better-off individuals in the disadvantaged groups, unlike welfare policies with an intention of relief. These latter policies target uncompetitive groups such as single mothers, the elderly, children or

victims of nihilism. Falling into different categories than other remedies for social disease, affirmative action does not directly uplift those most trodden down in society. But it helps them indirectly by setting up role models, restoring their self-respects and giving them motivations. In this sense, affirmative action is active, while other social welfare policies are passive. However, we tend to instinctively sympathize with a program that helps the most unfortunate, while it takes some effort to convince us of the justification of a program that helps the comparatively better-off. In fact, the inefficiency of those welfare policies tends to obscure the virtues of affirmative action. Since African Americans as a social group share the same racial identity, criticisms of the welfare policies, which target underclass African Americans, tend to inculcate affirmative action, which often benefits middle-class African Americans.

In the field of higher education, affirmative action is even more likely to clash with related policies. Higher education, exclusive and conservative, has its unique tradition of academic autonomy. Universities select elites and talents through competition and contest by clear-cut and definite criteria. Racial discrimination, which is concealed by academic standards, tends to escape exposure and judgment. More important, tertiary education is positioned at the top of the education system, or, to illustrate, the competing athletes have finished the long race and are coming to the finishing line. Up to this stage, much discrimination and injury in the past has become molded as unalterable. Although, to satisfy the same academic requirements, black students often have to make more efforts and undergo more hardships than white students, the criteria of selection in higher education can only be based on the present facts. It is very difficult to examine the history of every individual applicant. The problem of minority underrepresentation is not only a problem at the entrance to higher education; rather it reflects many problems that nonwhite students encounter before they reach this entrance. In this case, only by modifying regular criteria, that is, by partially upsetting normal institutions and traditions, is it possible to increase the proportion of African Americans.

Affirmative action is also hardly in line with policies that favor other student groups such as ex-servicemen, athletes and the children of alumni. In fact, none of these policies are individual-regarding or accordant with formal equality. Yet, these policies

have rarely given rise to disputes about fairness. Favors to veterans which, for instance, are based on the GI Bill have produced high profit return to national economy. Alumni exert social influence or provide donation that universities, especially private institutions, cannot afford to overlook. School sports teams generate revenue for schools, although Bergmann is highly suspicious of the validity of this statement (Bergmann, 124). At least, famous athletes increase the popularity of their schools. These policies, which are based on efficiency consideration or utilitarianism, are more readily accepted than affirmative action, which is based on far more compelling reasons of social justice but is more demanding on morality.

As such, affirmative action, which is history-regarding and interventionist, is at odds with several relevant policies which are based on classical liberalism, welfarism or utilitarianism. In its implementation, affirmative action gets entangled in a web of the related policies and touches upon multiple values, conventions and traditions behind these policies, which will create reaction and resistance.

In a summary of the above policy analysis, the logic of policy elements can be identified: Since policy is context-sensitive, policy linkage can shake or strengthen the normative basis of a policy. Normative basis may determine the choice of policy problem. Policy problems may decide the coverage and duration of policy objectives. Policy objectives in turn define policy instruments, which most directly influence policy implementation.

Consequently, it can be assumed that the decline of affirmative action can mainly be attributed to the following reasons: Being at odds with several related policies, affirmative action has always been built on a precarious normative basis. The change in the US government social policy paradigm is another factor that has been draining away this normative basis. The changes in public values and beliefs have shifted the focus of the policy from a compensatory remedy for blacks to racial diversity, with more and more people included as beneficiaries. This has obviously increased the coverage and duration of the policy objective and in turn demands more and larger policy instruments. In this way, affirmative action will increasingly come into conflicts with the prevailing classical liberalistic thinking and compete more severely with other policy programs for

resources. Therefore, the successful implementation of affirmative action, which is a comprehensive project, is in want of more cooperation from external parties.

As assumed earlier, affirmative action is just and therefore has justification to continue. Once the policy begins to manifest defects in its implementation, solutions to the problems may be found by making alterations in some elements of the policy. After all, continuous adjustments of policies are inherently part of the policy implementation (Gornizka, 15).

### **5.3. Evaluation in Light of the Theories of Equality and Higher Education**

#### **5.3.1. Higher Education as a Unique Policy Context**

Higher education is an important domain of affirmative action implementation. The elite sector, in particular, is where disputes mainly arose and lawsuits were filed. Should affirmative action be implemented in higher education? What are the justification, feasibility and social significance of implementing the policy in higher education? The following evaluation of affirmative action attempts to find answer in light of Rae's theory of equality and the theories of higher education by some other authors.

Elites constitute the head of a society. Without an elite class, a society will lack the initiative to innovate and make progress. The task of cultivating candidates for the elite class falls on the institutions of higher education. With the advent of massification, higher education has been converted from a privilege to a right and in turn to an obligation (Trow, 1973, 4-5). This means that many black youths who would have been outside the system are granted the same opportunity as the children from the advantaged groups. But at the stage of mass higher education, higher education qualification is no longer a guarantee to enter the elite class (Peter Scott, 1998, 125).

However, the system's mission to produce elites for all fields of society has by no means terminated. It is of course unrealistic to expect universities of all tiers to take on this mission. The system's expansion mainly occurred in the popular sector, having only in a small degree undermined the status or altered the functions of the elite sector. Rather, this sector has been given more importance and protection. The top-ranking universities will continue to function as the cradle of the elites as they traditionally did.



The ties connecting the elite class and the elite universities continue to exist.

The present status of African Americans necessarily demands not only an improvement of their education in general, but also an increase in their participation in the elites. No doubt, it is the elite class that is decisive for the future of the country and for the basic patterns of benefit distribution. A race that is wholly confined to blue-collar positions is bound to have no great expectations. In order to fundamentally change the current situation, the formation of a vigorous and strong elite community among African Americans is indispensable. Consequently, it is mandatory that elite universities produce a large number of elites among African Americans who, for historical reasons, have been underrepresented in the higher education system.

But higher education is Janus-faced, and its negative side, from the position of African Americans as the disadvantaged group, is particularly harmful: A formal meritocracy allocates opportunity according to performance in education, where blacks were weakest (Lemann, 43). Higher education as a reproduction mechanism contributes to new class formation, which has a tendency to copy the old class pattern (Peter Scott, 111; Bourdieu & Passeron, 11). Especially with the influence of market powers, family background has become increasingly decisive, so that the education system has even less capacity to elevate the disadvantaged group (Philip Brown, 1995, 746). What is most dangerous about it is that the privileged group can become “fixed and permanent”, and consequently obtains “the ability to be overbearing”.<sup>4</sup> Especially when the privileged group is made up of the majority of the population, the danger of tyranny of the majority may arise.

Because of the above-mentioned tendencies--that African Americans who seek admission to higher education tend to be located in a rather adverse position as compared to their counterpart in the white bloc, and that universities tend to duplicate the existing social structure--the law of the free market does not apply to higher education, and elite higher education in particular. African American candidates have to have extra help, or they will continue to be excluded from elite universities and

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<sup>4</sup> Guinier, Lani, *The Tyranny of the Majority* (The Free Press, New York, 1994), 1.

consequently excluded from many social advantages.

Affirmative action may function, as Lani Guinier puts it, to “disaggregate the privileged group to ensure checks and balances of fluid, rotating interests” (Guinier, 1994, 4). This could be achieved by gradually changing the proportion of the ingredients in the products of higher education, which will hopefully guarantee a balanced black proportion in the elite circle. Ultimately, there will be changes in the nature of the whole society, which will help Americans move toward a fairer society (Bergmman, 29).

Higher education makes a great difference to the components of the elite class. As is pointed out by Craig Calhoun, different sorts of degrees from different kinds of higher education institutions promise enormously different futures (Calhoun, 49-50). But even Eastland, an opponent of affirmative action, agrees that without a favorable policy, minority students would be mainly distributed at the low tiers of the system (Eastland, 59). To African Americans, this is a matter of race as well as of individuals. If a great number of African Americans enter the mainstream of society via elite universities as an important route, or a royal road, so to speak, it will help to summon up the courage of the whole race in their combat against nihilism. Of course, this also promotes ethnic diversity in the mainstream of society.

It is necessary for universities to uphold academic autonomy and adhere to strict criteria in selecting and training elites. But it is a fact that their academic threshold is adverse to many black students who have great potentials. After all, there exists a wide gap between black and white students in life environment and education conditions. An increase in the number of black elites will boost changes in the existing status. For this reason, the admission policies of elite universities should first of all change, so as to trigger a chain of changes. Affirmative action is such a trigger for this chain of changes. It deserves notification that it only moderately transcends the tradition. Considering race as a plus in admission does not bring essential changes to academic standards, nor does it change the universities' traditional orientation to elite selection and training.

### **5.3.2. Equality in Higher Education**

#### **a. Individual Equality versus Racial Equality**

The practice of equality is a pursuit of pure ideals in an extremely complex context. The implementation of affirmative action in higher education has incurred considerable criticisms, a very common charge being that it is against the creed of equality to all. It has been a university tradition to enroll students based on academic records. It must be admitted that this approach of considering no class distinction or individual differences is an important appeal based on individual equality of opportunity and therefore, to comment from the perspective of history, is the most affirmative and democratic. But this is only the simplest way to achieve equality, according to Rae (Rae, 28). In the irredeemably complex reality, there exist disparities, very strikingly, between white and black students. The disparities on the university campus are by no means in line with the creed of equality to all. The simple approach to equality will invariably lead to results that deviate from the ideal of equality.

It is true that, by affirmative action, students from middle-class families are more likely to be admitted than those from the underclass, but the program at least has been effective in eliminating some of the disparities between the two races, though it tolerates the disparities between the rich and the poor. In the policy implementation, equality between individuals and equality between races, both of which fit into Rae's definition of equality, come into conflict against each other (Rae, 81, 43). Now that racial problems fundamentally affect American society, or, when racial disparity very severely hinders social mobility and concentrates power in the hands of the advantaged group, to reject equal opportunity among races in favor of equal opportunity among individuals have little justification.

#### **b. Higher Education as Resource versus Public Demand for It**

Higher education as a valuable social resource has become increasingly accessible to a larger group of the populace at the stage of massification. Yet, it is not likely that public demand for this resource can ever be satisfied. Burton Clark expects that in the future national systems of higher education cannot expect to return to any earlier steady state

or reach a new stage of balance, simply because demands on universities outgrow their capacity to respond.<sup>5</sup> Institutions oriented to elite training are bound to be limited and hence likely to become the loci of competition. This is not just because quality universities take a larger proportion of the national education resources and promise more opportunities to enter the elite class. More important, the elites have substantial influence upon national policies and benefit distribution. The dispute about affirmative action reflects the degree to which the society admits African Americans into the arena of competition for social resources. In this case, a simplistic application of democratic principles may interfere with the effective administration of the state and hinder the progress of society. It may even lead to the tyranny of the majority. The harmony of a society based on individualism as well as democracy depends on mutual respect, especially respect for the minority.

### **c. Two Alternatives to Equal Opportunity: Procedures versus Prospects**

Equality of opportunity is the American creed. Admission criteria purely based on academic record promises equality of opportunity. But it is only one approach to equal opportunity by means of fair procedures. Affirmative action promises another approach to equal opportunity by giving consideration to fair prospects. Both forms fit Rae's definition of equality of opportunity (Rae, 66). From the perspective of social practice, the former form is the most practical and easiest to manipulate. And from the perspective of social justice, it is a great progress as compared to recruitment criteria based on class, gender or race. However, in the grave reality, people have different starting places. Especially when the difference is salient, equal opportunity solely based on equal procedures is destined to end in unequal results. Only for those who have an approximately equal starting place is it fair to consider only procedures. Otherwise, this form of equal opportunity applies only under certain given conditions. For example, in the selection of a captain, a general or in sports competition, emphasis on equal prospects may wreck the ship, destroy the army or lose the game.

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<sup>5</sup> Burton. R. Clark, *Creating Entrepreneurial Universities: Organizational Pathways of Transformation* (UK: Pergamon Press 1998), 129.

Louis P. Pojman brings into comparison the field of sports, where blacks are over-represented without affirmative action, and argues that merit should have the priority in education and industry at least as much as in sports (Pojman, 192). To this argument, Bergmann points out that people are apt to confuse such institutions as schools with playing fields where only certain fixed procedures apply. The playing fields provide arenas for tests of only narrowly defined merits, while schools have other worthy purposes (Bergmman, 112). The comparison of higher education with sports is in fact an analogy between two incomparable categories. For one thing, athletes constitute only a very small proportion of the nation's population, and they are engaged in activities that are by no means a normal state of life. For another, their gains and losses are not necessarily connected with the honor and disgrace of their whole class or community. In contrast, higher education involves people who are engaged in normal social life and comprise a considerable proportion of the population in a modern society. These people will take the major responsibility in the development and prosperity of society. They aim at social harmony and mutual benefits, unlike sportsmen, who come together to compete and vie with one another. Higher education is a project to construct a modern, democratic society. Elite higher education especially is an important component for a balanced and normally operating society.

The playing field is not as naïve as it seems even when equal procedures are applied. Athletes have different experiences before they come to the competition. Some athletes who receive scholarship for their athletic excellence are in fact beneficiaries of another type of affirmative action, a type not based on race, though. On the other hand, higher education may realize worthy purposes even without equal procedures but with equal prospects or equal results, or whatever you may label it for propaganda reasons. Higher education is a process of fostering and training candidates more than an institution to select or eliminate them. Nicholas Lemann takes a rational standpoint and views a first job or a place in school no more than an opportunity. "[I]t's only because we sort people so firmly so early that it looks like a result", he says (Lemann, 53). In other words, one is readily trapped by such propaganda as "quota" or "reverse discrimination" because of one's presumption and impatience. Justice O'Connor,

regarding the two *Michigan* cases (2003), agreed that higher education was a unique institution with the responsibility to educate the next generation of leaders who reflect the diversity of the United States, even though she was negative about affirmative action in other fields (Savage, 303). Even William Julius Wilson, an opponent of affirmative action, supports the program in education, where the disadvantaged are given the opportunity to make up for the lag (Beckwith and Jones, 32)

The wish for every individual to have equal prospects is obviously too idealistic, but the appeal for two races to have equal prospects should by no means be ignored. Solely depending on equal procedures when people apparently do not have equal starting places would mean deliberately creating inequality in prospects. Of course, in seeking equality of opportunity, emphasis on equal prospects does not always mean complete denial of equal procedures. Affirmative action programs that use race as a “plus factor” in university admission consider equal prospects under the precondition that equal procedures are given priority.

#### **d. The Extent of Equality versus Effectiveness**

In dealing with the “black problem”, two points deserve great attention: First, it was mainly because the federal budget was limited that affirmative action rather than other schemes was chosen to attack the problem. Second, discrimination against African Americans is deeply rooted in American society and history. A social engineering program intended to eradicate this evil will invariably consume great social resources. Rae suggests considering equality from two aspects: the extent of equality and the degree of equality (Rae, 107). In the case of affirmative action, the two aspects encroach upon each other: The limited resources must be concentrated within a limited scope. Once the number of beneficiaries outgrows the scope allowed by the resources, the program will cease to be effective.

After the *Bakke* case when affirmative action shifted its basis from compensation to diversity, the beneficiary population has been increasing, leading to a greater extent of equality and more diluted government resources. If, according to the opponents, affirmative action were ended so as to give everyone equal treatment, equality would

reach an even greater extent. But the limited resources, which could have helped some people out, would be of no significance once they were scattered across the whole society. What is more, the resources would be evenly scattered among individuals who are strikingly different. Those who insist on a termination of affirmative action refuse to regard two facts in American reality: the limitation of government funds and the rootedness of racial inequality. Thus can be seen the invalidity of this simplest notion of equality: It is not that it goes beyond the literal definition of equality, but that it is neither fair nor effective as a project to upgrade the disadvantaged.

As has been discussed above, higher education is a valuable social resource, for which public demands will hardly ever be satisfied and hence over which disputes will hardly ever end. Termination of affirmative action may shift the focus of the vociferation but is not likely to quiet it down. In fact, the approach of universal equality is a perfunctory, or rather hypocritical, measure to appease an unappeasable dispute. In contrast, affirmative action, which well fits the literal definition of equality, has been looking for a balance between fairness and effectiveness.

#### **e. Equal Consideration versus Equal Treatment**

According to Rae, equality is a relative concept that offers myriads of alternatives. In higher education, where different individuals with strikingly different backgrounds are involved, where is the point of departure to get nearer to the ideal of equality? Rae's proposal is not "equal treatment", but "equal care" (Rae, 82). "Equal care" means to consider everyone as an equal, while "equal treatment" means to give the same treatment to everyone. When people are apparently different from each other, equal consideration entails different treatments. And vice versa, only unequal treatments will entail results that are nearer to equality. As Rae observes, the more a society endeavors to guarantee equal consideration for its members, the more it endeavors to differentiate its treatments accorded to different social members who have different needs (Rae, 82).

The notion of giving everyone equal consideration in the form of different treatment is based on the belief that everyone is equal in value. It gives every individual equal consideration and in the meantime respects individual differences. Of all the

approaches to equality as proposed by Rae, the notion of equal consideration comes nearest to idealism. Without combination with reality, the ideal of equality will only remain abstract, shallow or symbolic. When exploited, it may even become hypocritical. Once combined with the reality in American higher education system, equal consideration for African Americans will necessarily justify unequal academic criteria in their recruitment because of their special history and present situation. The unequal allocation of education resource is a compensation for African Americans, with which to even out the lag between the race and the rest of American society. The intention is to make them the equals of other races, rather than to make them more advantaged than others. The notion of equality is relative, but the equal consideration and equal respect argument gives absolute support to affirmative action.

#### **5.4. Comment on Criticisms of Affirmative Action**

The above analysis, in the light of several theories, gives support to affirmative action and at the same time has arrived at the conclusion that most attacks upon the policy will not hold up to scrutiny. But there is a fact that cannot be conjured away: Opponents of affirmative action have a great constituency. It is necessary to examine the elements in the opponent arguments that are so attractive to the public. After all, thoughts of philosophers and theorists cannot substitute for public consensus, like in a court, where the judge cannot substitute for the jury.

The most severe charges against affirmative action concentrate on the fact that the policy is against the creed of equality to all. Equality to all, as well as liberty to all, is the very belief that has integrated the citizens of the United States, who are from different races and different cultural backgrounds. For Americans, individual effort and talent are considered to be decisive for success. By nature, the claim of equality for all is based on the motto of liberty for all. Therefore, the principle of liberty should have the highest priority in social justice.

Traditionally, the American government has embraced policies that encourage self-dependence rather than reliance on the government or society. By this criterion, affirmative action, which is based on government intervention, is indeed unconventional.



The most salient manifestation of government intervention is inequality of treatment. As has already been detailed above, the justification of this unequal treatment is grounded in the legacy of a racist history. And the interventionist measure is employed simply as a painful surgery to improve a bad situation (Bergmann, 29). This surgery, even if it constitutes injustice to some extent, is tolerable when it is necessary to avoid an even greater injustice (Rawls, 7).

However, once this surgery is applied to the American reality, it is by no means simple. The American nation is one of great diversity, but it has to be united by a single belief, or it must be “absolutely dependent on a broad-based national consensus on certain fundamental issues in order to function properly as a unified nation”. This belief must be broad, brief and powerful to integrate such a nation of diversity (Moen, 251). It must rest on simple and straightforward notions rather than arguments based on complex reasoning. Once the belief is established, it is no longer open to alteration or strategical adjustment. That is, it must be unquestioned, like a national religion (Ibid, 251).

Formal equality as advocated by opponents of affirmative action is unambiguous and much more of a convention in American reality. The public is familiar with it and has little difficulty in appreciating its rationale. Consequently, it is easy to be widely embraced by the public. In the dispute about affirmative action, many opponents overemphasize justice of procedure, as if it could be free from the scrutiny of history or could avoid the intuitive question such as “Is it fair?” In the same way, they frequently impose simplistic definitions upon affirmative action, using such terms as “quota” or “reverse discrimination”. They tend to highlight the redress function of the policy as if it has imposed uniformity upon the society. As a result, the public fails to see that affirmative action allows inequality, only that such inequality must be arranged in a way that will benefit the most disadvantaged in the long run. In contrast, supporters of affirmative action, who advocate a program which apparently takes the form of inequality, has to tell a long and complex story about history and the present situation with the purpose to prove what apparently looks unequal is in fact equal. Indeed, it is easy to convince one that “treating people who are alike differently is discrimination”,

while it is much less so to convince one that “treating people alike who are really different may be discrimination, too” (Moen, 213).

Classical liberalism laid the foundation for the United States and paved its way to prosperity. But inherently it had some defects, which sometimes were made manifest as serious social problems. The conflicts between the unfettered industrial capitalists and their victims and the institutional and de facto segregation between whites and blacks are such cases in point. This demanded modification of the political philosophy and practices. New Deal liberalism was the result of such modification. A philosophy can afford to remain abstract and idealistic, while the practice that embodies the philosophy has to be concrete and down to earth. As a product of New Deal liberalism, affirmative action is entangled in the complexity of reality and necessarily exposed to criticisms and attacks. But since it is based on the principles of justice and equality and has demonstrated considerable feasibility in its implementation, it is worthwhile to make some effort in its improvement. The criticisms and attacks, rather than an excuse to end it, may well give an impetus to mend it.

## CHAPTER 6

### EPILOGUE

This study analyses and interprets the implementation of affirmative action in higher education from the perspective of history, theory and practice. It eventually brings the discussion to the following conclusion: Affirmative action is to a great extent predestined by the unique history of the United States. It not only accords with Rawls' principle of difference, but also contributes to the accomplishment of the principle of liberty and the principle of equality of opportunity. And it fits the definition of equality as prescribed by Rae. The problems during the policy implementation tend to emerge in its application to the complex practice rather than lying in the aspect of theory. It is possible to solve or control these problems by altering the policy elements, which is an inherent part of the policy process. As long as affirmative action is a quest for social justice and has demonstrated considerable feasibility in its implementation, the suggestion is reasonable that the policy should be mended, not ended.

With the passage of more than forty years since the introduction of affirmative action, the United States has undergone great changes in both social environment and ideology. Apparently, it is of little significance if the arguments are purely grounded in the situation forty years ago when the policy was at first instituted. But disregarding history and its evolution, we are not likely to properly regard the present situation. Therefore, the author has been balancing and making choices between the past versus the present and theory versus practice, so as to achieve objectivity as much as possible in this analysis and interpretation of affirmative action.

The initiation and later the full implementation of affirmative action are both out of the consideration of social justice and the negotiation between interest groups. This is a strategy to cope with the great pressure of social turbulence. In this sense, affirmative action is "negative", or passive. The original intention of the policy was to solve the problems of African Americans, an objective which was accepted by the mainstream of American society, although the policy was met with voices of discontent from the very

beginning. The fact that the policy has survived the criticisms and lasted till today implies how difficult it is to find a substitute for it.

To pass judgment of the slavery and segregation system is something simple and explicit, while the estimation of its aftermath is far more difficult. Should the systems of slavery and segregation in American history justify permanent compensation? The Supreme Court in its *Bakke* case ruling in fact gave a negative answer to this question. Admittedly, the idea of permanent compensation based on the past is neither justified in theory nor feasible in practice. The argument of diversity, which is oriented to the future, gave new justification of preferential treatment of African Americans. However, the inclusion of other disadvantaged groups in the program has intensified conflicts in resource distribution. Especially, changes in demographic structure and industry structure have triggered a spiral for the worse, making the policy context increasingly adverse for African Americans.

Disagreements regarding the continued implementation of affirmative action are influenced by many factors, one of which is grounded in the fact that people have different perspectives and judgments about black problems and the present status of African Americans. Regarding such a complex social problem, it is very difficult for the opposite parties to convince each other simply by presenting quantitative evidences such as statistics. In this case, it is difficult to arrive at a consensus as to what is the index of full equality between blacks and whites or what is the moment when black problems are defined as having finally been solved. To be specific, even without difference between blacks and whites regarding such an index as middle class proportion, employment rates and income standards, it does not fully justify the declaration that black problems have been thoroughly solved. In other words, the plight of African Americans is not only a matter of quantity, but also a matter of quality.

After institutional obstacles were cleared, the key to the ultimate solution of black problems, after all, rests on the African Americans themselves. To be specific, in order to stand a fair chance in the free market system, African Americans need initiative and upward motive. Regarding such intangible issues as motivation and initiative, affirmative action, no doubt, is potent: The program will produce a large numbers of

elites among African Americans who are engaged in education as well as in various fields. They have the possibility to directly upgrade the basic education level and improve the local culture of black communities. Higher education is, to a large extent, shaped by the external world. Vice versa, higher education as the cradle for elites and for all types people of ability and skills, in turn, fashions the world. In this circle, higher education is a section that has great initiative. Affirmative action intervenes in this fashioner and triggers a spiral for the better.

As a foreigner, I have the possibility of being extricated from the interest groups involved and taking a detached position in the analysis of the policy. But I have my own background that influences my judgment. To a great extent, it is because of my concern about the disadvantaged groups in my home country that I sympathize with affirmative action and consequently chose the policy as the focus of my research. The situation of the United States and that of China are vastly different, but both countries have disadvantaged groups created by wrongs in the past. Four years after the United States institutionally abolished racial segregation, China institutionally segregated its urban areas and rural areas, which has largely defined the country's social pattern for half a century. With the decline in the rural economy and the influx of peasants into the urban areas, the underclass in China begins to take on features similar to those of the American urban poor. Given my special background, I naturally have sympathy with African Americans. Despite the many disputes incurred by affirmative action, the effects of the policy cannot be overlooked. And to remark from a perspective outside the United States, affirmative action makes a valuable case of reference in promoting the disadvantaged and minority groups.

The arguments given by both the pros and cons are intriguing. While I side with the proponents of affirmative action, the arguments of both parties are helpful for me to envision policies in favor of the disadvantaged in China and to predict the difficulties in applying such policies. Through the study and analysis of American affirmative action, looking at both its merits and defects, this study seeks to contribute to promoting the disadvantaged groups in China.

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